TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 157

RYAN STEVEDORING CO., INC., PETITIONER,

vs.

PAN-ATLANTIC STEAMSHIP CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 21, 1954

CERTIORARI GRANTED OCTOBER 14, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

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[fol. 1]

IN UNITED STATES DISTRICT COURT, FOR THE EASTERN DISTRICT OF NEW YORK

Docket No. 11520 Cal. No. 551

FRANK PALAZZOLO

vs.

PAN ATLANTIC STEAMSHIP CORPORATION AND WATERMAN STEAMSHIP CORPORATION

and

PAN ATLANTIC STEAMSHIP CORPORATION, Third-Party Plaintiff,

vs.

RYAN STEVEDORING CO., INC.

DOCKET ENTRIES

1951

Feb. 13. Petition for removal from Supreme Court, Kings County, filed.

Feb. 15. Jury demand filed.

Feb. 26. Notice of motion filed to vacate notice of examination, etc.

Feb. 26. By Rayfiel, J., order filed allowing defendant, Pan-Atlantic Steamship Corp., to file a third-party complaint impleading Ryan Stevedoring Co., Inc.

Feb. 27. Notice of motion filed to permit oral examination of defendant, etc.

Feb. 28. Third-party complaint filed. Summons issued.

Feb. 28. Answer of defendants filed.

[fol. 2] Feb. 28. Before Rayfiel, J., above motions argued. Decision reserved. Exchange papers by 3/7/51. All papers by 3/9/51.

Mar. 3. Summons returned and filed. Served on defendant, Ryan Stevedoring Co., Inc.

Mar. 7. Note of issue and notice of trial filed.

Mar. 26. By Inch, J., order filed extending time to answer to April 11, 1951.

1951

Apr. 13. Notice of motion filed for a preference.

Apr. 18. Before Rayfiel, J., motion for a preference withdrawn.

Apr. 18. Before Galston, J., order filed extending time, etc.

May 1. By Byers, J., order filed extending time for third-party defendant to answer to 5/16/51.

May 21. By Byers, J., order filed extending time of third-party defendant to answer to 6/6/51.

May 22. By Rayfiel, J., decision rendered (1) granting defendant's motion to vacate notice of examination; (2) granting plaintiff's motion for oral examination of defendants. Settle order on notice. (See memo.)

May 29. By Rayfiel, J., order filed on plaintiff's motion for oral examination of defendants, etc.

June 7. Answer of third-party defendant filed.

July 25. Notice of motion filed for production of witnesses for oral examination. (Ret. 8/1/51.)

July 25. Notice of motion filed for preference. (Ret. 8/1/51.)

Aug. 1. Abruzzo, J., motion for order to produce. (Adj. to 8/15/51.)

Aug. 1. Abruzzo, J., motion for preference for day certain. (Adj. to 8/15/51.)

Aug. 15. Affidavit of Mack Kreindler in opposition to motion for production of witnesses filed.

[fol. 3] Aug. 15. Abruzzo, J., motion to direct defendants to produce, etc. Granted. Settle order on one day notice.

Aug. 15. Abruzzo, J., motion for preference, etc. Decision reserved. All papers by end of Sept., 1951.

Aug. 17. By Abruzzo, J., order filed granting motion for production of witnesses for examination.

Aug. 30. Affidavit of Gossett W. McRae filed re: employment of Chief Mate Thorvald Mikkelsyn.

Sept. 19. Exceptions to interrogatories and notice of hearing filed. (Ret. 9/26/51.)

Sept. 24. Notice of motion filed to permit American Mutual Liability Ins. Co. to intervene, etc. (Ret. Oct. 3, 1951.)

Sept. 26. Galston, J., hearing on exceptions to interrogatories. (Adj. to 10/10/51.)

1951

Oct. 3. Byers, J., motion to intervene. (Adj. to 10/17/51.)

Oct. 8. By Abruzzo, J., motion for preference denied. (See memo on papers.)

Oct. 10. Byers, J., hearing on exceptions to interrogatories. (Adj. to 10/17/51.)

Oct. 17. Affidavit of Mack Kreindler filed. Affidavit of Gilda Tedesco filed. Affidavit of Herman B. Gerringer filed.

Oct. 17. Before Byers, J., hearing on exceptions to interrogatories, etc. Motion argued and granted as indicated. Interrogatories 1, 2, 3, 4 to be answered as indicated. 5 withdrawn. 6 sustained. 7-8 to be answered as indicated. Settle order on notice.

Hearing on motion permitting American Mutual Lia. Ins. Co. to intervene as party plaintiff, etc. Motion argued. Decision reserved. All papers by 10/18/51.

[fol. 4] Oct. 18. By Abruzzo, J., order filed denying plaintiff's motion for a preference.

Oct. 24. By Byers, J., order filed on exceptions to interrogatories.

Oct. 25. By Byers, J., decision rendered on motion to permit American Mutual Liability Ins. Co. to intervene, etc. Motion denied if plaintiff executes assignment, otherwise granted. Settle order. (See memo on papers.)

Nov. 15. Notice of motion filed for an order granting summary judgment to Ryan Stevedoring Co. and dismissing third-party complaint, etc. (11/21/51.)

Nov. 21. Defendants' answers to interrogatories filed.

Nov. 21. Before Abruzzo, J., hearing on motion for summary judgment, etc. (Adj. to Dec. 12/51.)

Nov. 26. By Byers, J., order filed on motion to permit intervention of American Mutual Liability Ins. Co. (See memo on motion papers.)

Dec. 12. Before Kennedy, J., above motion adjourned to 12/19/51.

Dec. 19. Before Kennedy, J., above motion adjourned to 1/9/52.

1952

Jan. 9. Before Rayfiel, J., above motion adjourned to 1/16/52.

Jan. 16. Deposition of Frank Palazzolo filed.

Jan. 16. Before Rayfiel, J., motion for summary judgment adjourned to 1/23/52.

Jan. 18. Agreement re: assignment of lien filed pursuant to memo of Oct. 25, 1951.

Jan. 27. Before Rayfiel, J., motion for summary judgment adjourned to 1/28/52—9:45 A.M. in chambers.

[fol. 5] Jan. 28. Before Rayfiel, J., above motion argued. Decision reserved.

Jan. 30. Notice of motion filed for re-argument of previous application and for a preference retd. (2/4/52.)

Feb. 4. Before Abruzzo, J., motion for preference argued. Decision reserved. Affidavit of Mack Kreindler in opposition filed.

Feb. 18. By Rayfiel, J., decision rendered denying motion for summary judgment to dismiss third-party complaint. (See opinion.)

Mar. 5. By Rayfiel, J., order filed denying motion for summary judgment to third-party defendant.

May 2. By Abruzzo, J., decision rendered denying motion for re-argument of preference motion. (See memo on papers.)

May 14. By Abruzzo, J., order filed denying motion for re-argument of preference application.

May 26. Inch, J., case called. Pre-trial requested.

June 3. Abruzzo, J., pre-trial 6/23/52—11 A.M.

June 23. Abruzzo, J., pre-trial adjourned to June 26/52—11 A.M.

June 26. Abruzzo, J., pre-trial marked off.

Nov. 25. Notice of motion filed for preference (12/1/52).

Dec. 1. Before Rayfiel, J., motion for preference argued and submitted. Affidavit in opposition filed.

Dec. 2. By Rayfiel, J., decision rendered on motion for preference. Motion granted. Case to be placed at foot of day calendar for January 5/53. Submit order. (See memo on papers.)

1952

Dec. 4. By Rayfiel, J., order filed granting motion for preference. Case to be placed at foot of day calendar for January 5/53.

[fol. 6] 1953

Jan. 7. Rayfiel, J., case called for trial. Adjourned to January 19/53.

Jan. 15. Rayfiel, J., pre-trial held and concluded.

Jan. 29. Transcript of record of pre-trial filed.

Jan. 30. Before Inch, J., case called. Ready.

Feb. 2. Before Inch, J., case called. Trial ordered and adjourned to 2/3/53.

Feb. 3. Before Inch, J., case called. Trial resumed and adjourned to 2/4/53.

Feb. 4. Before Inch, J., case called. Trial resumed and adjourned to 2/5/53.

Feb. 5. Before Inch, J., case called. Trial resumed and adjourned to 2/6/53.

Feb. 6. Before Inch, J., case called. Trial resumed and adjourned to 2/9/53.

Feb. 9. Before Inch, J., case called. Trial resumed and adjourned to 2/10/53.

Feb. 10. Order of sustenance filed.

Feb. 10. Before Inch, J., case called. Trial resumed and concluded. Jury rendered verdict for plaintiff for $75,000.00 as against Pan-Atlantic Steamship Corporation.

Judgment docketed for plaintiff for $75,000.00 as against Pan-Atlantic Steamship Corporation.

Feb. 11. Before Inch, J., Mr. Behrens, attorney for defendant, moves to set aside jurors' verdict on the various grounds indicated. Motion denied.

Mr. Behrens, attorney for defendant, moves for a directed verdict and for a new trial on the various grounds indicated. Motion denied.

Mr. Behrens, attorney for defendant, moves for a direction of no judgment at this time, on the grounds indicated. Motion denied.

[fol. 7] Feb. 11. Court orders execution of judgment be stayed until the further order of this Court.

On previous motions during trial on which the Court re-

served decisions, counsel will exchange briefs by March 4, 1953. All papers March 11, 1953.

Feb. 25. Notice of appeal and bond No. 1923 filed.

Mar. 3. By Inch, J., exchange briefs on above by 3/18/53. All papers 3/25/53.

Apr. 1. Transcript of pre-trial before Inch, J., filed (Rm. 608).

Apr. 6. Plaintiff's bill of costs filed with costs taxed at $117.00.

Apr. 6. By Inch, J., order filed extending time to file record to 5/6/53.

Apr. 7. By Inch, J., decision rendered with findings adjudging Ryan to be entitled to judgment on third-party action together with costs.

Motions, upon which decision was reserved, denied. (See Opinion Book:)

Apr. 15. By Inch, J., judgment filed dismissing third-party complaint in favor of third-party defendant with costs taxed at $38.00, etc.

Apr. 15. Bill of costs filed.

Apr. 21. Notice of appeal filed.

May 7. Supersede as bond filed.

May 7. By Inch, J., order filed extending time to file record to 5/26/53.

May 7. By Galston, J., order filed dismissing action with prejudice as to defendant, Waterman Steamship Corp.

May 26. C. of A. order filed extending time to file record re Waterman and Pan-Atlantic to June 30, 1953.

May 27. Order filed extending time to file record re Waterman and Pan-Atlantic to June 30, 1953.

[fol. 8] In Supreme Court of the State of New York, Kings County

Frank Palazzolo, Plaintiff,

against

Pan-Atlantic Steamship Corporation and Waterman Steamship Corporation, Defendants

Summons—December 26, 1950

Plaintiff designates Kings County as the place of trial. Plaintiff resides in Kings County.

To the above named Defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorneys, within 20 days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

David M. Fink & Jacquin Frank, Attorneys for Plaintiff, 141 Broadway, New York 6, N. Y.

Dated, New York, December 26th, 1950.

[fol. 9] In Supreme Court of the State of New York, Kings County

Complaint

Plaintiff, complaining of the defendants by David M. Fink & Jacquin Frank, his attorneys, respectfully alleges and shows to this Court:

First: Upon information and belief, that at and during all the dates and times hereinafter mentioned, the defendants were foreign corporations doing business in the State of New York, with an office and place of business in the City of New York.

Second: That at and during all the dates and times hereinafter mentioned, the defendants operated, managed and controlled the S. S. "Canton Victory" under a bare boat charter.

Third: That at the time hereinafter mentioned, the said vessel was at Pier 6, Bush Terminal, in the Borough of Brooklyn, City of New York and was being discharged by an independent stevedore, the Ryan Stevedoring Company.

Fourth: That at the time hereinafter mentioned, the plaintiff was in the employ of the Ryan Stevedoring Company as a longshoreman and assisting in the work of discharging the vessel.

Fifth: That on or about the 20th day of July, 1949, while the plaintiff was at work in the hold of the said vessel, suddenly, without any fault on his part and wholly and solely through the carelessness and negligence of the defendants, their officers, crews, agents, servants and employees, a pile of rolls of pulp collapsed, as a result of [fol. 10] which one of them fell upon the plaintiff, as a result of which he sustained severe and permanent injuries. That the defendants, their officers, crews, agents, servants and employees caused, suffered and permitted the rolls of pulp to be loaded and transported in a reckless, careless and negligent manner, without being properly tiered, piled and secured, as a result of which one of the said piles was caused to collapse and strike the plaintiff.

Sixth: That the defendants failed to furnish the plaintiff with a seaworthy vessel.

Seventh: That by reason of the premises aforementioned, the plaintiff was injured, bruised and wounded, so that he became sick, sore, lamed and disabled, and was upon information and belief, permanently injured, and so remains, and was internally and externally injured, and so remains, and was and for a long time will be prevented from attending to his daily occupation, thereby losing large sums of money which he otherwise would have earned, and has expended and will continue to expend large sums of money in endeavoring to be cured of his injuries aforesaid, and has endured and will continue to endure great pain and suffering, all to his damage in the sum of One hundred and fifty thousand ($150,000) Dollars.

Wherefore, plaintiff demands judgment against the defendants in the sum of One hundred and fifty thousand ($150,000) Dollars, together with the costs and disbursements of this action.

David M. Fink & Jacquin Frank, Attorneys for Plaintiff.

[fol. 11] In United States District Court

Answer

Defendants, by Gay & Behrens, their attorneys answer the complaint of the plaintiff as follows:

First: Admit the allegations contained in paragraph "First."

Second: Admit the allegations contained in paragraph "Second" except that they deny that they operated, managed and controlled those portions of the SS Canton Victory which were under the exclusive supervision and control of Ryan Stevedoring Co. Inc., its agents, servants and/or employees.

Third: Admit the allegations contained in paragraph "Third."

Fourth: Deny that they have any knowledge or information sufficient to form a belief as to the allegations contained in paragraph "Fourth."

Fifth: Deny the allegations contained in paragraph "Fifth."

Sixth: Deny the allegations contained in paragraph "Sixth."

Seventh: Deny the allegations contained in paragraph "Seventh."

Wherefore, defendants demand judgment that the complaint herein be dismissed, together with the costs and disbursements of this action.

Edward J. Behrens, Gay & Behrens, Attorneys for Defendants.

[fol. 12] IN THE UNITED STATES DISTRICT COURT

Civil Action File No. 11520

FRANK PALAZZOLO, Plaintiff,

against

PAN ATLANTIC STEAMSHIP CORPORATION AND WATERMAN STEAMSHIP CORPORATION, Defendants,

and

PAN-ATLANTIC STEAMSHIP CORPORATION, Third-Party Plaintiff,

against

RYAN STEVEDORING CO., INC., Third-Party Defendant

THIRD-PARTY SUMMONS—February 28, 1951

To the above-named Third-Party Defendant:

You are hereby summoned and required to serve upon David M. Fink & Jacquin Frank, Esqs., plaintiff's attorneys, whose address 141 Broadway, New York 6, N. Y. and upon Gay & Behrens who are attorneys for the above-named defendant and third-party plaintiff, and whose address 70 Pine Street, New York 5, N. Y. an answer to the third-party complaint which is herewith served upon you and an answer to the complaint of the plaintiff, a copy of which is served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by [fol. 13] default will be taken against you for the relief demanded in the third-party complaint.

Percy B. G. Cilkes, Clerk of the Court, By Sidney R. Feuer, Deputy Clerk.

IN UNITED STATES DISTRICT COURT

THIRD-PARTY COMPLAINT—Filed February 28, 1951

The third-party plaintiff, Pan-Atlantic Steamship Corporation by its attorneys, Gay & Behrens as and for its

complaint against the third-party defendant alleges upon information and belief as follows:

First: That at all the times hereinafter mentioned the third-party plaintiff was and still is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware with an office for the transaction of its business in the Borough of Manhattan, City and State of New York.

Second: That at all the times hereinafter mentioned the third-party defendant, Ryan Stevedoring Co. Inc., was and still is a corporation organized and existing under and by virtue of the laws of the State of [fol. 14] Alabama with an office for the transaction of its business in the Borough of Manhattan, City and State of New York.

Third: That at all of the times hereinafter mentioned the SS Canton Victory was owned by the United States of America and was operated, controlled and managed by the defendant and third-party plaintiff, Pan-Atlantic Steamship Corporation, under a bareboat charter from the United States Maritime Commission.

Fourth: That heretofore and prior to July 20, 1949, pursuant to agreement, the third-party plaintiff, Pan-Atlantic Steamship Corporation, employed the third-party defendant, Ryan Stevedoring Co. Inc., to perform services on board the SS Canton Victory.

Fifth: That pursuant to said agreement the third-party defendant, Ryan Stevedoring Co. Inc., prior to July 20, 1949, loaded the SS Canton Victory with various types of cargo including a cargo of rolls of paper pulp.

Sixth: That pursuant to its agreement the third-party defendant, Ryan Stevedoring Co. Inc., on July 20, 1949, was engaged in the performance of work on board the SS Canton Victory and in connection with said work, engaged the plaintiff, Frank Palazzolo.

Seventh: It is alleged that the plaintiff, in the course of his work on behalf of the third-party defendant, Ryan Stevedoring Co. Inc., was injured on July 20, 1949. His allegations of negligence are contained in his complaint, a copy of which is hereto annexed, marked "Exhibit A" and made a part hereof.

Eighth: That at all the times mentioned in the complaint of the plaintiff, the third-party defendant Ryan Stevedoring Co. Inc., was in complete charge and exclusive possession of and control of that part of the vessel, [fol. 15] SS Canton Victory, where plaintiff was working and where he alleges he was injured.

Ninth: That if the plaintiff herein sustained injuries at the time and place mentioned in his complaint by reason of any negligence other than his own, such injuries were sustained through the negligence of the third-party defendant, Ryan Stevedoring Co. Inc., its agents, servants and/or employees and not by any negligence or want of care on the part of the third-party plaintiff, Pan-Atlantic Steamship Corporation.

Tenth: The plaintiff, in his complaint, has alleged that a pile of rolls of pulp collapsed as a result of which one of them fell upon the plaintiff causing him to sustain severe and permanent injuries. It is further alleged that the defendants, their officers, crews, agents, servants and employees caused, suffered and permitted the rolls of pulp to be loaded and transported in a reckless, careless and negligent manner without being properly tiered, piled and secured, as a result of which one of the said piles was caused to collapse and to strike the plaintiff. The plaintiff, in his complaint, further alleges that he was not furnished with a seaworthy vessel.

Eleventh: The loading of the rolls of pulp paper was performed by the third-party defendant, Ryan Stevedoring Co. Inc., and at the time the SS Canton Victory was turned over to the third-party defendant, Ryan Stevedoring Co. Inc., said vessel was in a seaworthy condition. If the rolls of pulp were loaded improperly or in a negligent manner without being properly tiered, piled and secured, and if the SS Canton Victory at the times mentioned in the complaint was thus rendered unseaworthy, such unseaworthiness was caused and created solely through the conduct, negligence, carelessness and recklessness of the third-party defendant, [fol. 16] Ryan Stevedoring Co. Inc., its agents, servants and/or employees in the manner in which they performed the aforesaid work and in their failure to make proper preparation and to take proper precautions in the carrying out of the aforesaid work.

Twelfth: That if the plaintiff herein recovers a judgment against the defendant and third-party plaintiff Pan-Atlantic Steamship Corporation, the third-party defendant, Ryan Stevedoring Co. Inc., will be liable as indemnitor to the third-party plaintiff, Pan-Atlantic Steamship Corporation, for the amount thereof.

Thirteenth: That if the plaintiff is successful in this action the third-party plaintiff, Pan-Atlantic Steamship Corporation, will be damaged in the sum of money recovered by the plaintiff.

Fourteenth: The third-party plaintiff, Pan-Atlantic Steamship Corporation, will be so damaged by reason of the aforesaid conduct, negligence, carelessness and recklessness of the third-party defendant, Ryan Stevedoring Co. Inc.

Fifteenth: That if it is determined in this action that the third-party plaintiff, Pan-Atlantic Steamship Corporation, is liable to the plaintiff because of the alleged occurrence on board the SS Canton Victory, while it was under the aforesaid agreement between it and the third-party defendant, Ryan Stevedoring Co. Inc., the third-party plaintiff, Pan-Atlantic Steamship Corporation seeks to have determined in this action its rights against the third-party defendant, Ryan Stevedoring Co. Inc.

Wherefore, Pan-Atlantic Steamship Corporation, defendant and third-party plaintiff, demands judgment [fol. 17] against the third-party defendant, Ryan Stevedoring Co. Inc. for all sums that may be adjudged against defendant and third-party plaintiff, Pan-Atlantic Steamship Corporation, in favor of the plaintiff, Frank Palazzolo, plus counsel fees and disbursements in defense of the plaintiff's claim against this defendant and third-party plaintiff, or in the alternative, asks that the rights of the third-party plaintiff, Pan-Atlantic Steamship Corporation, and the third-party defendant, Ryan Stevedoring Co. Inc., be adjudged.

Gay & Behrens.

(Verified by Mack Kreindler, Feb. 27, 1951.)

[fol. 18] In United States District Court

Answer of Third-Party Defendant Ryan Stevedoring Co., Inc.—Filed June 7, 1951

The third-party defendant, Ryan Stevedoring Co., Inc., by its attorneys, Alexander & Ash, as and for its answer to the third-party complaint, respectfully alleges and shows upon information and belief as follows:

First: Denies any knowledge or information sufficient to form a belief as to each and every allegation set forth in paragraphs marked "First," "Third" and "Thirteenth" of the third-party complaint.

Second: Denies each and every allegation set forth in paragraph "Fourth" of the third-party complaint, except it admits that pursuant to agreement Pan-Atlantic Steamship Corporation employed the third-party defendant to perform stevedoring services at various ports including the Port of New York.

Third: Denies each and every allegation set forth in paragraph marked "Fifth" of the third-party complaint except it admits that pursuant to an agreement this answering third-party defendant prior to July 20, 1949, loaded the SS Canton Victory with various types of cargo including a cargo of rolls of paper pulp.

Fourth: Admits that it is alleged that the plaintiff was injured in the course of his work on behalf of the third-party defendant on July 20, 1949, but denies any knowledge or information sufficient to form a belief as to each and every remaining allegation set forth in paragraph "Seventh" of the third-party complaint.

[fol. 19] Fifth: Denies each and every allegation set forth in paragraphs marked "Eighth," "Twelfth" and "Fourteenth" of the third-party complaint.

Sixth: Denies each and every allegation set forth in paragraph "Ninth" of the third-party complaint in so far as it relates to, refers to, or alleges any negligence on the part of this answering third-party defendant and, except as so denied, denies any knowledge or information sufficient to form a belief as to each and every remaining allegation set forth in paragraph "Ninth" of the third-party complaint.

Seventh: Admits that the plaintiff has alleged in his complaint what is set forth in substance in paragraph "Tenth" of the third-party complaint, but denies any knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph "Tenth" of the third-party complaint.

Eighth: Admits that the loading of the rolls of paper pulp was performed by this answering third-party defendant and, except as so admitted, denies any knowledge or information sufficient to form a belief that at the time the SS Canton Victory was allegedly turned over to this answering third-party defendant the said vessel was in a seaworthy condition and, except as so denied, denies each and every remaining allegation in paragraph "Eleventh" of the third-party complaint which alleges any negligence, carelessness and recklessness on the part of this answering third-party defendant.

Ninth: Admits that the third-party plaintiff seeks what is set forth in paragraph "Fifteenth" of the third-party complaint, but denies that the third-party plaintiff has any right of recovery over in any respect as against this answering third-party defendant.

[fol. 20] As and for a first, separate and complete defense to the third-party complaint, this answering third-party defendant alleges upon information and belief as follows:

Tenth: That the third-party complaint fails to allege facts sufficient to constitute a cause of action or a claim upon which any relief can or should be granted.

As and for a second, separate and complete defense to the third-party complaint, this answering third-party defendant alleges upon information and belief as follows:

Eleventh: That at all the times referred to in the third-party complaint, the plaintiff was in the employ of this answering third-party defendant and the injuries which are alleged to have been sustained by the plaintiff arose out of and in the course of the plaintiff's employment by this answering third-party defendant.

Twelfth: That at the time the plaintiff herein sustained his alleged injuries and previously thereto, this answering third-party defendant duly complied with all the require-

ments of the U. S. Longshoremen's & Harbor Workers' Compensation Act, and that, pursuant to said Act, this answering third-party defendant had insured the payment of any compensation and/or medical expenses with a company duly authorized to write such insurance.

Thirteenth: That by reason of such compliance by the third-party defendant and by reason of the plaintiff's employment being within the purview of the U. S. Longshoremen's & Harbor Workers' Compensation Act, the exclusive remedy of the plaintiff and anyone else as against [fol. 21] this answering third-party defendant is compensation under and by virtue of said Act.

Fourteenth: That by reason of the facts and circumstances hereinbefore set forth and by reason of Section 905 of 33 U. S. C. A., this third-party defendant had no duty nor can it be liable to the third-party plaintiff herein and this Court can render no judgment in favor of the third-party plaintiff against this answering third-party defendant.

As and for a third, separate and partial defense to the third-party complaint, this answering third-party defendant alleges upon information and belief as follows:

Fifteenth: Repeats, reiterates and realleges each and every allegation contained in paragraphs "Eleventh" and "Twelfth" hereof with the same force and effect as if the same were here repleaded at length.

Sixteenth: That by reason of said employment and the coverage provided under the aforesaid Act, this answering third-party defendant cannot be liable to the third-party plaintiff for an amount in excess of what, if anything, this third-party defendant would have been called upon to pay to the plaintiff herein in compensation, had this action not been instituted.

Seventeenth: That the limit of this third-party defendant's liability to the third-party plaintiff, if there be any, which is herewith denied, is circumscribed by the provisions of the U. S. Longshoremen's & Harbor Workers' Compensation Act and the amounts therein provided for.

[fol. 22] As and for a fourth, separate and partial defense and setoff to the third-party complaint, this answering

third-party defendant alleges upon information and relief as follows:

Eighteenth: That at the time the plaintiff sustained his alleged injuries and previously thereto, this answering third-party defendant had duly secured the payment of compensation to its employees, including the plaintiff herein, pursuant to the U. S. Longshoremen's & Harbor Workers' Compensation Act.

Nineteenth: That in pursuance of said Act, this answering third-party defendant had insured the payment of such compensation and medical expenses with a company duly authorized to write such insurance.

Twentieth: That pursuant to the aforesaid Act there has been paid on behalf of this third-party defendant to the plaintiff, as compensation, $2,940 and medical bills and other expenses have been paid in the amount of $8,862.57, as nearly as the same can be now estimated.

Twenty-first: That if it is determined that the third-party plaintiff herein is entitled to be indemnified in whole or in part, then this third-party defendant is entitled to an offset in the amount of $11,802.57, as nearly as the same can be now estimated, which sum represents the aggregate amount of compensation and medical expenses paid on behalf of this third-party defendant.

Wherefore, this answering third-party defendant, Ryan Stevedoring Co., Inc., demands judgment (1) dismissing [fol. 23] the third-party complaint of Pan-Atlantic Steamship Corporation, together with the costs and disbursements of this action or (2) in the event that the third-party plaintiff recovers judgment against the third-party defendant, that such judgment be reduced by the amount of the set-off pleading herein and (3) that the third-party defendant have such other, further and different relief as shall seem just and proper.

Sidney A. Schwartz, Member of Firm of Alexander & Ash, Attorneys for Third-Party Defendant.

Dated: New York, N. Y., June 6, 1951.

[fol. 24] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S INTERROGATORIES

Interrogatories propounded by plaintiff to be answered in writing and under oath by the defendants Pan Atlantic Steampship Corporation and Waterman Steamship Corporation.

1. Please state when on Voyage 21 Northbound of the S. S. "Canton Victory" discharging operations began at New York and when it was finished?

2. How many tiers of paper pulp were there stowed in Hold #3?

3. When the paper pulp was loaded at Georgetown, South Carolina on this trip, what method of stowage was used, the chime method or the flooring-off with dunnage?

4. During the course of the use of pier 6, Bush Terminal by the Waterman Steamship Corporation and Ryan Stevedoring Co., Inc., was the chime method of loading the paper pulp rolls used interchangeably with the dunnage flooring-off method?

a) If your answer is yes, please state which was the more frequent one in use.

5. Please attach to the answers to the interrogatories a copy of the log involving the accident to the plaintiff.

6. Please state the number of accidents at pier 6, Bush Terminal occuring to longshoremen engaged in discharg-[fol. 25] ing paper pulp from the time that pier 6 was taken over by Waterman Steamship Corporation up to the date of the accident, July 20, 1949.

7. Please state the relationship, legal or otherwise, between Waterman Steamship Corporation and Ryan Stevedoring Co., Inc., the Third-Party Defendant.

8. Please state the relationship, legal or otherwise, between Pan Atlantic Steamship Corporation and Waterman Steamship Corporation.

David M. Fink & Jacquin Frank, Attorneys for Plaintiff.

To: Gay & Behrens, Esqs., Attorneys for Pan Atlantic Steamship Corporation and Waterman Steamship Corporation.

[fol. 26] In United States District Court

Order on Exceptions to Interrogatories—Filed October 24, 1951

The defendants having excepted to interrogatories propounded by the plaintiff, and said exceptions having been brought on for hearing before the Hon. Mortimer W. Byers, District Judge, on the 17th day of October, 1951,

Now, after reading and filing the notice of motion dated September 14, 1951, the affidavit of Gilda Tedesco, Esq., sworn to the 25th day of September, 1951, the affidavit of Mack Kreindler, Esq., sworn to the 5th day of October, 1951, and after hearing Gay & Behrens, Attorneys for the defendants, by Mack Kreindler, Esq. of counsel, in support of said exceptions, and David M. Fink & Jacquin Frank, Attorneys for plaintiff, by Herman B. Gerringer, Esq. of counsel, in opposition thereto, it is

Ordered, that exceptions to interrogatories numbered 1, 2, 3 and 5 are overruled; and it is further

Ordered, that interrogatory number 4 be modified so as to read as follows:

> "4. During the course of the use of Pier 6 Bush Terminal on July 20, 1949, by the Waterman Steamship Corporation and Ryan Stevedoring Co., Inc., was the chime method of loading the paper pulp rolls used interchangeably with the dunnage flooring-off method?
>
> a) If your answer is yes, please state which was the more frequent one in use."

and it is further

[fol. 27] Ordered, that item 7 be modified to read as follows:

> "7. Please state the legal relationship between Waterman Steamship Corporation and Ryan Stevedoring Co., Inc., the Third-Party Defendant."

and it is further

Ordered, that interrogatory 8 be modified to read as follows:

"8. Please state the legal relationship between Pan Atlantic Steamship Corporation and Waterman Steamship Corporation."

and it is further

Ordered, that the exception to interrogatory number 6 be sustained, and it is further

Ordered that David M. Fink & Jacquin Frank, attorneys for the plaintiff, shall produce the plaintiff for examination before trial by Gay & Behrens, attorneys for the defendants, Pan Atlantic Steamship Corporation and Waterman Steamship Corporation on the 7th day of November, 1951 at an agreed time and place, and it is further

Ordered, that the defendants shall serve answers to the plaintiff's interrogatories as modified herein, within ten days after the production of the plaintiff for examination.

Mortimer W. Byers, U. S. D. J.

Dated: Brooklyn, N. Y., October 24, 1951.

[fol. 28] In United States District Court

Defendants' Answer to Interrogatories—Filed November 21, 1951

Pursuant to the Order of this Court, dated October 24, 1951, the defendants answer the interrogatories propounded by the plaintiff as follows:

1. Discharging operations began at New York at about 8:00 A.M. on July 20 and were completed at about 11:00 A.M. on July 22.

2. Upon information and belief, the source thereof being the deposition of Don Millard Fisher, taken in this action on August 21, 1951 (page 25), there were two tiers of paper pulp stowed in hold No. 3.

3. The chime method was used.

4. On July 20, 1949, the chime method of loading was solely used.

5. The log entry is as follows:

"1,600 #3 L/H F. Palazzola, Longshoreman, was engaged in disch. Rolls of paper pulp in #3 L/H. While breaking down top tier of rolls of pulp he was caught under a falling roll from top tier while trying to avoid another roll of pulp that was rolling toward him. Injured man sustained broken left leg above knee. Morphine (¼ gr.) administered by Master, Capt. J. D. Ware. Dr. Charache, 475 Prospect Park, Brooklyn, attended patient on dock. Patient removed to Norwegian Hospital, Brooklyn. D.M.F."

[fol. 29] 7 and 8. The S.S. Canton Victory was owned by the United States of American and was under their boat charter to Pan-Atlantic Steamship Corporation; on July 20, 1949, Waterman Steamship Corporation was servicing the vessel in the Port of New York for Pan-Atlantic Steamship Corporation; Ryan Stevedoring Co., Inc., was discharging and loading the vessel on July 20, 1949, pursuant to contract arrangements between Ryan Stevedoring Co., Inc., and Pan-Atlantic Steamship Corporation.

Gay & Behrens, Attorneys for Defendants.

(Verified by Edward J. Behrens, Nov. 16, 1951.)

[fol. 30] In United States District Court

Notice of Motion by Third-Party Defendant for Summary Judgment—Filed November 15, 1951

Sirs:

Please Take Notice that upon the annexed affidavit of Sidney A. Schwartz, duly sworn to the 31st day of October, 1951, and the annexed affidavit of Paul A. Dwyer, duly sworn to the 14th day of November, 1951, the undersigned will move this Court at a stated term for the hearing of motions to be held at the United States Courthouse, Washington & Johnson Streets, Borough of Brooklyn, City

of New York, on the 21st day of November, 1951, at 10:30 A. M. thereon or as soon thereafter as counsel can be heard for the entry of an order herein granting summary judgment to the third-party defendant, Ryan Stevedoring Co., Inc., and dismissing the third-party complaint of Pan-Atlantic Steamship Corporation as against Ryan Stevedoring Co., Inc., on the grounds that said third-party complaint fails to state a claim upon which relief can be granted and fails to state a cause of action as against Ryan Stevedoring Co., Inc., and for such other, further and different relief as in the premises to the Court may seem just and proper.

Sidney A. Schwartz.

Dated: New York, New York, October 30, 1951.

[fol. 31] To: David M. Fink & Jacquin Frank, Esqs., Gay & Behrens, Esqs.

AFFIDAVIT OF SIDNEY A. SCHWARTZ, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK,
County of New York, ss:

Southern District of New York,

SIDNEY A. SCHWARTZ, being duly sworn, deposes and says:

That he is a member of the firm of Alexander & Ash, who are the attorneys for the third-party defendant herein.

That he is fully familiar with all the pleadings and proceedings heretofore had herein.

That the defendant, Pan Atlantic Steamship Corporation, impleaded Ryan Stevedoring Co., Inc., on a third-party complaint, a copy of which is hereto annexed, made a part hereof and marked Exhibit A.

That in view of the fact that the plaintiff was an employee of said third-party defendant on the day of his [fol. 32] accident, July 20, 1949, the third-party defendant

set up as an affirmative defense that the third-party complaint failed to allege any facts to constitute a cause of action or a claim upon which any relief could be granted and also set up the affirmative defense that, since the third-party defendant had covered the infant plaintiff with the benefits of compensation and medical under the U. S. Longshoremen's & Harbor Workers' Compensation Act, the aforesaid statute was a complete bar.

Annexed hereto, made a part hereof and marked Exhibit B is the answer of the third-party defendant to the third-party complaint of Pan Atlantic Steamship Corporation.

That Ryan Stevedoring Co., Inc., according to the information contained in the file of the compensation carrier for Ryan Stevedoring Co., Inc., was insured by American Mutual Liability Insurance Company for any compensation liability under the aforesaid Act and that in accordance with the policy of insurance which had been issued by American Mutual Liability Insurance Company to Ryan Stevedoring Co., Inc., and in accordance with the aforesaid Act, there has been paid to the plaintiff herein $2,940, representing compensation benefits, and $8,862.57, as nearly as the same can now be estimated, representing medical benefits.

That it is undisputed that Ryan Stevedoring Co., Inc., had covered the instant plaintiff under the aforesaid Act and for the benefits deriving therefrom as appears from the pleadings and proceedings heretofore had herein which include a motion on the part of the compensation carrier to intervene in this action to impress a lien upon any recovery.

[fol. 33] That, in view of the fact that Ryan Stevedoring Co., Inc., was so covered, under the authorities set forth in a memorandum of law to be submitted upon the argument of this motion, there can be no liability on the part of Ryan Stevedoring Co., Inc., to Pan Atlantic Steamship Corporation, absent any contract providing for indemnity, in the event that Pan Atlantic Steamship Corporation is held liable for its own negligence or for supplying an unseaworthy vessel.

That, as appears from the affidavit of Paul A. Dwyer, Vice President of Ryan Stevedoring Co., Inc., annexed

hereto, there is no such contract so that the third-party complaint is insufficient as a matter of law.

Wherefore, deponent respectfully prays that the third-party complaint be dismissed together with the costs and disbursements of this action.

(Sworn to by Sidney A. Schwartz, Oct. 31, 1951.)

[fol. 34] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF PAUL A. DWYER, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK,
County of New York, ss:
Southern District of New York,

PAUL A. DWYER, being duly sworn, deposes and says:

That he is Vice President of Ryan Stevedoring Co., Inc., and has been such for several years.

That this affidavit is submitted in support of the motion of Ryan Stevedoring Co., Inc., to dismiss the third-party complaint of Pan Atlantic Steamship Corporation on the grounds that the same does not state a claim upon which relief can be granted.

That the third-party complaint alleges that Ryan Stevedoring Co., Inc., was performing stevedoring services under a certain contract. In order to obviate any question as to the provisions of said contract deponent herewith states that there was no formal contract between Pan Atlantic Steamship Corporation and Ryan Stevedoring Co., Inc., but that the latter was simply performing services for Pan Atlantic Steamship Corporation under certain terms and conditions which were embraced in correspondence running between Pan Atlantic Steamship Corporation and Ryan Stevedoring Co., Inc., under dates of February 28, 1947, March 29, 1947, January 23, 1948, and September 14,

1948, and that the provisions and conditions set forth in said correspondence were the conditions under which Ryan Stevedoring Co., Inc., was discharging the vessel SS Canton Victory on July 20, 1949, when it is claimed the [fol. 35] accident occurred to the plaintiff herein, an employee of Ryan Stevedoring Co., Inc.

Annexed hereto, made a part hereof and marked as certain exhibits are copies of the aforementioned inter-office correspondence and which are as follows:

Memorandum of W. B. Garner, Executive Vice President of Pan Atlantic Steamship Corporation, dated February 28, 1947—marked Exhibit C.

Memorandum of W. B. Garner, Executive Vice President, dated March 29, 1947—marked Exhibit D.

Letter of Pan Atlantic Steamship Corporation dated January 23, 1948, to the President of Ryan Stevedoring Co., Inc.—marked Exhibit E.

Letter of Pan Atlantic Steamship Corporation, dated September 14, 1948 to the President of Ryan Stevedoring Co., Inc.—marked Exhibit F.

The exhibits heretofore referred to and annexed hereto will indicate to this Court that there was no formal contract between Pan Atlantic Steamship Corporation and Ryan Stevedoring Co., Inc., and that whatever agreement existed by virtue of the aforementioned exhibits did not contain any provision for Ryan Stevedoring Co., Inc., indemnifying Pan Atlantic Steamship Corporation for any fault alleged against Pan Atlantic Steamship Corporation with respect to any of its vessels, including the SS Canton Victory.

(Sworn to by Paul A. Dwyer, Nov. 14, 1951.)

[fol. 36] EXHIBIT A, ANNEXED TO AFFIDAVIT OF SIDNEY A. SCHWARTZ

Third-Party Complaint Printed, *supra*, pp. 13 to 17

EXHIBIT B, ANNEXED TO AFFIDAVIT OF SIDNEY A. SCHWARTZ

Answer of Third-Party Defendant, Ryan Stevedoring Co., Inc., Printed, *supra*, pp. 18 to 23.

EXHIBIT C, ANNEXED TO AFFIDAVIT OF SIDNEY A. SCHWARTZ

Stevedoring on Pan Atlantic Coastwise Services by Ryan Stevedoring Company, Inc., at: Boston, Mass., New York, N. Y., Philadelphia, Pa., New Orleans, La., Mobile, Ala., Panama City, Fla., and Tampa, Fla.

(And other ports which may be served by Pan Atlantic)
Effective on Voyages commencing at Gulf Ports on and after April 1st, 1947

Ryan Stevedoring Company, Inc., shall perform all stevedoring operations for Pan Atlantic Steamship Corporation coastwise service at the above named ports, and shall receive compensation as follows:

1. Cost of stevedoring, plus insurance and taxes, plus twenty-eight cents (28¢) per net ton on each ton of cargo loaded and on each ton of cargo discharged (except as otherwise provided herein).

2. The following items are to be included in regular stevedoring cost and not billed separately:

1. Assorting Cargo (when not performed by Passco's men on the dock, i. e., after the stevedoring process was completed).

[fol. 37] 2. Rolling Pulp.

3. Doubling up for Cargo Boxes.

3. No charge in addition to the compensation provided in Item 1 shall be made to Pan Atlantic by Ryan for the

loading or unloading of lighters or barges direct to and from the ship.

4. The following items will be billed by Ryan at actual cost, plus insurance and taxes:

1. Shifting Stowage.

2. Rehandling cargo in and out of ship and within ship, including cargo rehandled at a port intermediate between loading and discharging port.

3. Loading and unloading empty cargo boxes.

5. Other stevedoring extra labor not already provided for in other items, will be billed at cost plus 15%, plus insurance and taxes.

6. Cost of all dock labor, including tallymen, checkers, coopers, and watchmen furnished by Ryan Stevedoring Company, Inc., shall be billed to Pan Atlantic at actual cost plus insurance and taxes.

Approved W. B. Garner, Executive Vice Pres.

February 28, 1947.

[fol. 38] Exhibit D, Annexed to Affidavit of Sidney A. Schwartz

Pan Atlantic Steamship Corporation

3-29-47

Stevedoring on Pan Atlantic Coastwise Services by Ryan Stevedoring Co., Inc., At: Boston, Mass., New York, N. Y., Philadelphia, Pa., New Orleans, La., Mobile, Ala., and Panama City, Fla.

(And other ports which may be served by Pan Atlantic)

Effective on Voyages commencing at Gulf Ports on and after April 1, 1947.

Ryan Stevedoring Co., Inc., shall perform all stevedoring operations for Pan Atlantic S.S. Corp., coastwise services at the above named ports, and shall receive compensation as follows:

1. Boston, Mass., and Miami, Fla.

Cost of stevedoring, plus insurance and taxes, plus fifty cents (50c) per net ton on each ton of cargo

loaded and each ton of cargo discharged, except as otherwise provided herein.

At all other ports served by Pan Atlantic

Cost of stevedoring, plus insurance and taxes, plus twenty-eight cents (28¢) per net ton on each ton of cargo loaded and each ton of cargo discharged, except as otherwise provided herein.

2. The following items are to be included in regular stevedoring cost and not billed separately:

1. Assorting Cargo (when not performed by dock labor on the dock, i.e., after the stevedoring process was completed).

[fol. 39] 2. Rolling Pulp.

3. Doubling up for Cargo Boxes.

3. No charge in addition to the compensation provided in Item 1 shall be made to Pan Atlantic by Ryan for the loading and unloading of lighters or barges direct to and from the ship.

4. The following items will be billed by Ryan at actual cost, plus insurance and taxes:

1. Shifting Stowage.

2. Rehandling cargo in and out of ship and within ship, including cargo rehandled at a port intermediate between loading and discharging port.

3. Loading and unloading empty cargo boxes.

5. Other stevedoring extra labor not already provided for in other items, will be billed at cost plus 10%, plus insurance and taxes.

6. At Pier 6, Bush Terminal, Brooklyn, New York: Cost of all dock services to be billed Pan Atlantic in accordance with Mr. Von Herbulis' letters of March 11th, and March 18th, 1947. At All Other Ports Served by Pan Atlantic Cost of all dock services, such as tallymen, receiving and delivery clerks, coppers and watchmen furnished by Ryan Stevedoring Co., Inc., shall be billed to Pan Atlantic at actual cost plus insurance and taxes.

The above basis of stevedoring compensation shall take the place of and supersede the basis outlined in letter of February 28th, 1947.

Approved, W. B. Garner, Executive Vice-President.

[fol. 40] Exhibit E, Annexed to Affidavit of Sidney A. Schwartz

Pan Atlantic Steamship Corporation
Mobile, Alabama

January 23, 1948

Mr. F. L. Leatherbury, President
Ryan Stevedoring Company, Inc.
Mobile, Alabama

Subject: Stevedoring Compensation—Pan Atlantic Steamship Corporation Coastwise Vessels

My letter dated March 29, 1947 covering compensation and other matters in connection with stevedoring services rendered by Ryan Stevedoring Company, Inc., covering vessels operating in the coastwise services of the Pan Atlantic Steamship Corporation, is hereby amended so that the second paragraph under Item 1 shall read as follows:

At all other ports served by Pan Atlantic (This excludes Boston and Miami). Cost of stevedoring, plus insurance and taxes, plus thirty-three cents (33¢) per net ton of 2000 pounds for the cargo loaded and or discharged, except as otherwise provided herein.

The effect of this change is to allow Ryan an increase from 28¢ to 33¢ per net ton of 2000 pounds for service rendered in loading and or discharging coastwise cargo at ports served by Pan Atlantic Line, excluding Boston and Miami.

The compensation for services rendered at Miami as stipulated in my letter dated March 29, 1947 shall remain in effect.

The increase authorized in this communication becomes effective with vessels which commence to load or discharge on and after January 1, 1948.

Approved: W. B. Garner, Executive Vice President

[fol. 41] Exhibit F, Annexed to Affidavit of Sidney A. Schwartz

Pan Atlantic Steamship Corporation

Mobile, Alabama

September 14, 1948

Mr. F. L. Leatherbury, President
Ryan Stevedoring Company
Mobile, Alabama

Dear Red:

Subject: Stevedoring Compensation Pan Atlantic Steamship Corporation—Coastwise Vessels

We have considered the contents of your letter dated September 9, 1948, and agree that the circumstances are such as to justify an increase in your compensation for stevedoring services rendered on behalf of our vessels.

It is agreed that the second paragraph of Item 1 of our letter of agreement dated March 29, 1947 covering compensation and other matters in connection with stevedoring services rendered by Ryan Stevedoring Company, Inc., covering vessels operating in the coastwise services of the Pan-Atlantic Steamship Corporation, is hereby amended to read as follows:

At all other ports served by Pan Atlantic (This excludes Boston and Miami). Cost of stevedoring, plus insurance and taxes, plus forty-three (43¢) cents per net tone of 2,000 pounds for the cargo loaded and or discharged, except as otherwise provided herein.

[fol. 42] The increase authorized in this communication becomes effective with vessels which commence to load or

discharge at each respective port, and where the stevedoring-services are rendered by your firm, on and after October 1, 1948.

The compensation for services rendered at Miami, as stipulated in my letter dated March 29, 1947, remains unchanged, as you are compensated for services at that port on the basis of 50c per net ton of 2,000 pounds for overhead, supervision, use of gear, and profit.

This increased compensation is granted as a result of our recognition of the fact that your overhead expenses, costs and maintenance of gear, and other incidental items have increased materially and constantly since the original agreement was made.

Very truly yours,

Pan Atlantic Steamship Corporation, By W. B. Garner, Executive Vice President

WBG:ew

cc: Mr. Roberts, Captain Nicholson, Mr. Murray, Mr. Slaton, Mr. Parish, Mr. C. R. Wade, Mr. Cotlin.

[fol. 43] In United States District Court

Opinion on Denial of Motion for Summary Judgment—Filed February 18, 1952

Rayfiel, J.

This is a motion by the third-party defendant, Ryan Stevedoring Co., Inc., for summary judgment dismissing the third-party complaint herein on the ground that it does not state a cause of action.

The plaintiff, an employee of Ryan Stevedoring Co., Inc., sued the defendant Pan-Atlantic Steamship Corp., the bareboat charterer of the S.S. Canton Victory, for damages for personal injuries sustained by him. He alleged that the defendant Pan-Atlantic was negligent and that the vessel was unseaworthy. Pan-Atlantic impleaded Ryan, alleging *inter alia*, that Ryan had loaded the vessel in such a negli-

gent and improper manner as to render it unseaworthy, and that by reason thereof it is liable over to Pan-Atlantic for any sums which it may have to pay to the plaintiff.

The affidavits and memoranda submitted herein disclose that the S.S. Canton Victory was loaded with rolls of pulp paper by Ryan at Charleston, South Carolina, and that thereafter other employees of Ryan, including the plaintiff herein, unloaded the vessel at New York, during which unloading operation the plaintiff was injured.

[fol. 44] The third-party defendant contends that there can be no liability on its part to Pan-Atlantic either for contribution or indemnity, relying chiefly on the following two recent cases in the Court of Appeals for this circuit to sustain its position, namely, *Mikkelsen v. S.S. Granville*, 191 F. 2d 858, the *per curiam* opinion on rehearing appearing in 1951 AMC 1938, and *American Mutual Insurance Co. v. Matthews*, 182 F. 2d 322. In *Mikkelsen v. S.S. Granville*, Judge Abruzzo dismissed the libel on the ground that there was no contract of indemnity between the employer of the libelant and the shipowner and that therefore the employer's obligation was limited to his compliance with the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C., Sec. 905. Judge Abruzzo's opinion, reported in 1951 AMC 1531, states at page 1534, "In the case at bar, the employer did not owe the owner a duty to discover defects in the equipment which the shipowner furnished for its use in loading the ship. Its duty to discover defects in such equipment or in its own equipment was owed only to its employees and that duty the Longshoremen's Act abolished, substituting therefor the absolute duty to pay compensation." Judge Abruzzo based his decision on *American Mutual Liability Ins. Co. v. Matthews, supra*, which was an action for contribution brought by a shipowner's insurance carrier against the employer of an injured longshoreman, who had recovered a judgment against the shipowner. In that case too, the longshoreman was injured by reason of a defect in a guy rope, furnished by the ship, and it was held that the Longshoremen's and Harbor Workers' Act precluded any recovery on the theory of contribution.

Since that case was decided the United States Supreme

Court, in *Halcyon Line and Vinke & Co. v. Haenn Ship* [fol. 45] *Ceiling and Refitting Corporation*, decided on January 14th, 1952, held that there can be no contribution between joint tort-feasors except in collision cases.

In both *American Mutual Liability Ins. Co. v. Matthews*, *supra*, and *Mikkelsen v. S.S. Granville*, *supra*, the court restated the existing law that an employer may by contract, become bound to indemnify his promisee against liability resulting from the improper performance by said employer of the work undertaken by him. Both Judge Abruzzo and Judge Swan cited the case of *Westchester Lighting Co. v. Westchester Estates*, 278 N. Y. 175, 14 N. E. 2d 567; the leading case on that question in New York State. Such a contract of idemnity need not be in writing. It may be implied under the circumstances in the particular case. See *Burris v. American Chicle Co.*, 120 F. 2d 218; *Rich v. U. S.*, 177 F. 2d 688.

I find that there are issues of fact in this case which cannot be resolved on the pleadings and the papers submitted on this motion.

The question as to whether there was an implied agreement of indemnity between Ryan and Pan-Atlantic respecting the loading and unloading of the vessel and whether the alleged unseaworthiness was caused or created by Ryan, can be best determined only after a trial of the issues.

Accordingly, the motion is denied.

L. F. Rayfiel, U. S. District Judge.

February 18th, 1952.

[fol. 46] In United States District Court

Order Denying Motion for Summary Judgment—Filed March 5, 1952

The third-party defendant, Ryan Stevedoring Co. Inc., having moved this Court for the entry of an order herein granting summary judgment to the third-party defendant and dismissing the third-party complaint of Pan-Atlantic Steamship Corporation as against Ryan Stevedoring Co.,

Inc., third-party defendant, and said motion having come on for hearing before this Honorable Court on February 4, 1952,

Now, after reading and filing the Notice of Motion dated October 30, 1951, the affidavit of Sidney A. Schwartz verified October 31, 1951, the affidavit of Paul A. Dwyer, verified November 14, 1951, and after hearing Alexander & Ash, attorneys for the third-party defendant, by Sidney A. Schwartz, of Counsel, in support of said motion, and Gay & Behrens, attorneys for the defendants and third-party plaintiffs, by Edward J. Behrens, of Counsel, in opposition thereto, and the Court having filed its opinion dated February 18, 1952, it is

Ordered that the motion of the third-party defendant, Ryan Stevedoring Co., Inc., for an order granting summary judgment to the third-party defendant and dismissing the third-party complaint of Pan-Atlantic Steamship Corporation as against Ryan Stevedoring Co. Inc. be and the same hereby is denied.

Leo F. Rayfiel, U. S. D. J.

Dated: Brooklyn, N. Y., March 5th, 1952.

[fol. 47] IN UNITED STATES DISTRICT COURT

Brooklyn, New York,
February 3, 1953.

Transcript of Record

Before: Honorable Robert A. Inch, U. S. D. J.

APPEARANCES:

Messrs. Fink & Frank, Attorneys for Plaintiff; by Jacquin Frank, Esq., of Counsel.

Messrs. Gay & Behrens, Attorneys for Defendants and Third-Party Plaintiff, by Edward J. Behrens, Esq., of Counsel.

Messrs. Alexander & Ash, Attorneys for Third-Party Defendant; by Sidney J. Schwartz, Esq., of Counsel.

COLLOQUY BETWEEN COURT AND COUNSEL

(Discussion in chambers.)

Mr. Frank: For the purpose of simplifying and clarifying the issues upon the trial it is stipulated by and between all the parties mentioned in the complaint:

1. That by way of amplification of the complaint charging both negligence and unseaworthiness, it is the claim of the plaintiff that hatch No. 3 was improperly stowed, thereby creating a dangerous condition in the following respects:

(a) The cargo of pulp was stowed in an improper manner, and that the defendants instead of having the same stowed by flooring off each layer of rolls and placing planks on each layer, adopted and caused to be transported in a [fol. 48] tiering-up method known as the "chime" method.

(b) That having adopted the "chime" method, the defendants transported the same cargo without properly wedging the bottom rolls by properly approved and customary wedges.

(c) That the defendants instead of using proper wedges, used makeshifts, consisting of dunnage, so that the discharge of the cargo became dangerous, particularly in view of the fact that there was a list of the vessel toward the inshore side thereof.

(d) The defendants furnished a cargo plan to the plaintiff during the course of an examination before trial, which was marked Plaintiff's Exhibit for identification. Plaintiff at this time is not in a position to state whether that is a correct reflection of the cargo distribution in hatch No. 3. If it is, then plaintiff will contend upon the trial that the stowing of 465 pounds of pulp on top of cartons containing canned citrus fruit was improper, negligent and added to the unsafe condition of the cargo and the lower hold at hatch No. 3.

2. The defendants further stipulate for the purposes of trial that Pan Atlantic Steamship Corporation was the bare boat charterer of the S.S. Canton Victory, and the Waterman Steamship Corporation serviced the vessel in

the Port of New York; that for any negligence or unseaworthiness in connection with the matters hereinabove stated, the legal responsibility is that of the Pan Atlantic Steamship Corporation; that the defendant, Waterman Steamship Corporation, provisioned the vessel and hired the crew.

And may I stop for a moment here. Mr. Behrens, in connection with the testimony of one of your people in an examination before trial there was testimony to the [fol. 49] effect that the cargo plan was furnished to the stevedore by Waterman instead of by Pan Atlantic. Are you acquainted with that, or did you read the examination?

Mr. Behrens: I have read the examination, but I have no present recollection of it.

Mr. Frank: That was part of it, that the cargo plan was furnished to Ryan by Waterman.

Mr. Behrens: At this point I have asked in a letter to Judge Rayfiel that it be clearly indicated that Waterman Steamship Corporation's activities in provisioning the vessel and hiring the crew was "as servicing agent for Pan Atlantic Steamship Corporation." In short this case presents a problem in that while Mr. Frank has a legally responsible defendant in the bare-boat charterer, he seems to be endeavoring as well to procure a judgment against the servicing agent, against Waterman Steamship Corporation. I say that is improper, but I want it clearly understood that I will not stipulate that they just simply provisioned the vessel, because I want it definitely understood that their activity was as servicing agent for Atlantic Steamship Corporation, the bare-boat charterer.

Mr. Frank: Will you let me make my position clear on the record. I am a realist. What difference does it make——

The Court: You do not need to put this on the record.

(Further statements made off the record.)

Mr. Frank: Before the trial finishes, depending upon the evidence, the plaintiff will most likely—I cannot bind myself, your Honor.

The Court: That is right.

Mr. Frank: Will most likely move to discontinue against

the Waterman. The plaintiff cannot do it at this time in view of what I stated to your Honor, that one of the de-
[fol. 50] fendant's witnesses testified that he was employed by Waterman, and that is why I have to hold them in.

Mr. Behrens: I will not stipulate bluntly to the statement which Mr. Frank has just read, and that statement as it now exists is the last sentence, namely that the defendant, Waterman Steamship Corporation provisioned the vessel and hired the crew. I will not stipulate to that as stated.

The Court: That is understood.

Mr. Frank: That is understood. The next one has been complied with, that the plaintiff has incurred medical bills, copies of which——

Mr. Behrens: May I interrupt? You have omitted, Mr. Frank, the loading of the vessel and the discharge of the vessel at New York, which is important as between Mr. Schwartz's client and mine.

Mr. Frank: Yes, I left that out.

Mr. Schwartz: Do you want all of that in?

Mr. Behrens: I do not want all of it, no.

Mr. Frank: Let me read all of it, that the third-party defendant, Ryan Stevedoring Co., Inc., loaded the vessel at Georgetown South Carolina, and discharged the vessel at Brooklyn, New York.

Mr. Behrens: That sentence is agreeable to me, and I understand it is agreeable to Mr. Schwartz.

Mr. Schwartz: That is correct.

Mr. Frank: That Ryan Stevedoring Co., Inc., is a subsidiary of the Waterman Steamship Corporation, and its stock is entirely owned by the Waterman Steamship Corporation.

The defendants, by admitting the above, do not waive their right to object to the relevancy and materiality of the above during the trial.

Mr. Behrens: That part——

Mr. Frank: That may prove important, your Honor, and it may not. I do not know; I may not even urge it.

[fol. 51] The Court: I would like to eliminate it, I would like to eliminate the Waterman Steamship Corporation. You know very well now that the Waterman Steamship Corporation, in spite of this incidental testimony, is not the

responsible liable party. Now, I want to have a clean record. The representative of the charterer may properly object to evidence against it, but the minute that this jury gets into the fact that there is some kind of a steamship company mixed up in it, and then a statement that the case has been discontinued against a steamship company, that has a bad effect on the whole thing.

Mr. Frank: Let me ask you this——

The Court: When you discontinue, as you probably will if it looks that way to you at the trial, that discontinuence should not be made in the presence of the jury.

Mr. Frank: I had that in mind, that we would do that out of the presence of the jury.

The Court: Absolutely. It should be on the record, but why shouldn't we now do that while you are getting ready to try the case? The parties can be protected against any inadvertent testimony, so why shouldn't we eliminate the Waterman now?

Mr. Schwartz: Pan Atlantic Steamship Company operated, provisioned, manned and supplied the vessel.

Mr. Behrens: I have admitted that already in the answer.

Mr. Frank: But don't forget that your man testified after the answer. Do you expect me to leave him out?

Mr. Behrens: Let us go to the next step of the procedure. If you get a judgment against the charterer you can collect it, and that is just as good as though you monkeyed around with something that isn't involved. There is no question but that this charterer brought this cargo here, and had it loaded on the ship by——

Mr. Frank: By the third-party defendant, by the Ryan Stevedoring Company.

[fol. 52] Mr. Behrens: By the Ryan Stevedoring Company.

Mr. Frank: That is sufficient for me.

Mr. Behrens: There is no question about that, your Honor.

(Further discussion off the record.)

Mr. Schwartz: Why cannot we say Pan Atlantic managed, operated, provisioned and manned the vessel, so if any of their companies were negligent Pan Atlantic would

be responsible. Now, let us assume that Mr. Frank wants to read that deposition, and he reads the deposition and the witness states in the deposition, "I am employed by Waterman." What difference does it make when we have Mr. Behrens' admission that no matter what the witness said he is really in the employ of the Pan Atlantic Steamship Company.

The Court: Suppose, instead of putting any unfair burden on Mr. Frank, that you say it is understood by the plaintiff that he will discontinue as against Waterman unless something untoward happens on the plaintiff's case, that would cause him to consider that.

Mr. Frank: Your Honor, that is perfectly satisfactory to me, and your Honor knows I cannot do it at this time.

The Court: As to that I don't consider that the examination before trial of the mate, or whoever it was——

Mr. Behrens: The second mate.

The Court: Second mate, under these circumstances would be relevant or be competent at all except to confuse the jury.

Mr. Behrens: I do not see the materiality or relevancy of it for another reason.

Mr. Frank: Well, what Mr. Schwartz really meant, according to Mr. Behrens' stipulation, when the mate testified that he worked for Waterman, he actually worked for Pan Atlantic; isn't that right, Mr. Behrens?

Mr. Behrens: Not during all that time on this voyage.

[fol. 53] Mr. Frank: On this voyage, yes.

The Court: On this voyage.

Mr. Frank: Let me go then a little further. This order permitting the examination before trial covered both Pan Atlantic and Waterman. In other words, I do not want to be met with this, if I discontinue my action against Waterman, then they will object to the examination upon the ground that Waterman is not in the case.

Mr. Behrens: There is no such need for fear here. This is what happened, and this is my legal position. I will state it again. Mr. Frank made a motion to take the deposition of the defendants, both corporations, Pan Atlantic and Waterman. He wanted to take the depositions through certain people in a certain classification, chief

officer, second mate, and so forth. We appeared in opposition taking the position that neither company was properly to be examined through a second mate, and the Court held that the deposition should be taken through the lesser officer, the second mate on behalf of both defendants. The order entered by Judge Abruzzo directs the examination on behalf of the defendants. So in pursuance of the direction of the Court, and to avoid contemptuous conduct, we produced the second mate who was examined pursuant to that order. Under the order of the Court that was an examination on a deposition of both defendants.

Now, I say that the Court committed error in directing that examination. However, it is not a final order, it is not appealable, and before the Court of Appeals could ever pass upon the propriety of directing a ministerial person, one of lesser capacity to appear and bind the corporation by his testimony, the only way I could do that is when Mr. Frank wants to read that deposition, then I say I object to it, it is not proper. Rule 26 says thus and so, and says it can only be used if it is a deposition of certain persons, and in that fashion I can test whether he has the right to read that deposition. If counsel as-
[fol. 54] sumes that I would argue that this is only a deposition of Waterman, that is not so because this was directed to be a deposition of both defendants. So if there is fear in that respect I feel is without substance.

Mr. Frank: In other words, that is why, your Honor, I was loathe to discontinue at this stage. I knew some of the problems that I would be met with. Let me repeat again——

The Court: Now, let us say for the purpose of the record it is conceded that this second mate is an employee of ——

Mr. Behrens: Pan Atlantic Steamship Company.

The Court: Of the charterer?

Mr. Behrens: That is correct. I will concede it.

Mr. Frank: Then I will discontinue right now.

The Court: Is that agreed to?

Mr. Behrens: Yes, that presents no problem because he was an employee of Pan Atlantic Steamship Corporation, and I so stipulate.

The Court: This arrangement with Waterman was a local thing, but he was fundamentally an employee of the charterer?

Mr. Behrens: That is correct.

The Court: What is the name of this second mate?

Mr. Behrens: Don Fisher is the name of the mate.

The Court: Now, we have gotten that far, we know that Waterman is out now. Is there anything further?

Mr. Frank: There is one other phase, your Honor. May I read this?

The Court: Yes.

Mr. Frank: That the plaintiff has incurred medical bills, copies of which were heretofore furnished to both attorneys for plaintiff as well as for the defendant, and it is agreed that the bills submitted to the plaintiff and to the defendant by the third-party defendant, Ryan Stevedoring Co., Inc., shall be offered in evidence without any further [fol. 55] proof, and that the defendant concedes the reasonableness of all charges made in the course of the treatment of the plaintiff. The defendant by this agreement does not thereby concede the relevancy or materiality of such proof.

Let me explain the necessity for that. The stevedoring concern's compensation carrier expended in the neighborhood of $10,000 in medical bills, including expenses in the hospital where the plaintiff was, and is expending further money up to this time. And not only that but the plaintiff gave the stevedoring concern's compensation carrier an assignment of both compensation that they had paid him which was some $2,000—I am just quoting round figures, your Honor—and also the medical bill, so that if he recovers he is bound to pay it back. And I do not think of course under the circumstances I have got to get that in the record, only this fact that those bills are reasonable. And I understand my friend's position. Do you want me to state it, or do you want to state it yourself? Is it all right if I reiterate what you stated before Judge Rayfiel? He does not question the reasonable value of the services, but he wants to reserve the right to object to the relevancy and materiality. Am I stating that right?

Mr. Behrens: That is correct. In other words, the rea-

sonableness of these bills I do not contest. The propriety of admitting them in evidence as relevant and material, I reserve the right on that.

The Court: In other words, this is a question of whether or not the jury should have before them the right to deduct from their verdict——

Mr. Frank: Add. Not deduct.

Mr. Schwartz: Add.

Mr. Frank: Add. Not deduct, because here is what happens. If they give us a verdict he has to pay back.

The Court: He certainly has.

Mr. Frank: This $10,000.

[fol. 56] The Court: Yes, that is right.

Mr. Frank: He has to pay that back.

The Court: Yes. It is a lien.

Mr. Frank: It is not only a lien, but an actual assignment.

The Court: That is right.

Mr. Frank: Obviously if the jury doesn't get the picture that there was any medical expenses, then they will give him a verdict that does not include medical expenses.

The Court: You have got to show the results of the injuries and what expenses he incurred.

Mr. Frank: That is exactly it, your Honor.

Mr. Behrens: My point is that he incurred no medical expenses himself; the statute gives a direct cause of action to Mr. Schwartz against us, but it does not give the client here any cause of action.

Mr. Schwartz: May I answer that? Whether the statute specifically grants to the compensation carrier a cause of action for the medical expenses that they paid has been held to be immaterial as far as this plaintiff's lawsuit against a third-party defendant is concerned; whether he includes those expenses as part of his damages that he seeks to recover against the defendant or not, he must under the New York Court of Appeals most recent case repay to the compensation carrier all the expenses that they have incurred, whether he included them in his lawsuit or not.

Now, the compensation carrier can do lots of things: They can either bring an action for the medical expenses or otherwise, they can say to the man, we have a lien upon

your recovery. You can put in that proof in your action against the defendant, and if you do not put it in we will still get it back from you.

Mr. Frank: Your Honor can see the position that that places the defendant in. If his objection to the materiality is sustained, my man is paying out money that he does not get back.

[fol. 57] The Court: The fact that the carrier has a right to recover the amounts it has paid for the medical expenses of the plaintiff is a subsequent thing entirely to the plaintiff's suit for damages, for the reason that the plaintiff should prove not only the negligence and unseaworthiness, or either and the liability and the results to him and the fact that he was taken to the hospital and had these operations, and you will ask for a verdict in accordance with that——.

Mr. Frank: That is right, including the medical expenses.

The Court: Including the medical expenses, and after you have proved that before the jury, and the jury finds that you are entitled to a certain amount, then a certain amount of that that the compensation carrier is entitled to he will get back.

Mr. Frank: That is right.

The Court: Isn't that right?

Mr. Schwartz: We have taken care of the exact amount, so I don't see at this point any reason for the adducing of any bills. I think that we stipulated the amount, and Mr. Behrens is agreeable to stipulating it is a reasonable amount. The fight between them is whether that is an item that should be in the lawsuit with the defendant. But I say suppose he didn't have a compensation carrier, but had a good friend who gave him $10,000, to take care of him while he was sick, and that money was expended. Wouldn't that be the same thing?

Mr. Behrens: The Longshoremen and Harbor Workers' Act tells us as far as medical expenses are concerned just what you may do. I am not talking about the New York compensation laws, I am not talking about any friends. I am talking about the provisions of the Longshoremen and Harbor Workers' Act. It tells you that the compensation carrier or employer has a direct cause of action against

one who has undertaken to supply the medical expenses. [fol. 58] and it goes further, it tells you how to assert it. You assert it exactly under the law as though there had been an assignment. He has a right to bring this cause of action against the compensation carrier.

Mr. Schwartz: Let us look at this. The Longshore statute has a provision in there which gives to the compensation carrier a cause of action for medical expenses as against the third party. They use terms identical in the New York Workmen's Compensation Act. Under the decisions applicable to both acts the compensation carrier can do one of two things, that is, he can either assert the lien for the amount of those medical expenses he has against the plaintiff in his recovery against a third party, or he can bring an action against the third party. He is not obliged to bring an action against the third party; the statute gives a right to do it that way, but he also has the right to do as he has done here.

(Further statements made off the record.)

The Court: Suppose, Mr. Frank, when the plaintiff puts in his case, he proceeds and proves his injuries, and then his expenses. Now, in doing that why we can't stipulate that it did cost him so much in the hospital, and then you will have that.

Mr. Schwartz: We have covered that in the next paragraph.

Mr. Behrens: We have agreed as to what the cost was.

The Court: Then there is nothing for the jury except that they should incorporate that in their verdict.

Mr. Behrens: No, your Honor. My position is that this medical bill, regardless of the amount of its reasonableness which I concede, should not be an item of damage in this case; that Mr. Schwartz has no lien under the Longshoremen and Harbor Workers' Act, although he does under the New York State Compensation Act. All he has under the Longshoremen and Harbor Workers' Act in my view is an equitable right of subrogation. This whole [fol. 59] doctrine permitting the compensation carrier under that act to get his money back is an equitable doctrine in all these cases where the plaintiff proceeds against

a third party. There is no provision in the Longshoremen and Harbor Workers' Act which gives him a right, which gives him any right to get his money back at all. If he has a right, it is an equitable right under the doctrine of subrogation.

Mr. Frank: We have got to pay it.

Mr. Behrens: But why?

Mr. Frank: We have given him an assignment.

Mr. Behrens: But that was not necessary, under the Harbor Workers' Act.

Mr. Schwartz: You have to, irrespective of that.

The Court: I think this whole trouble could be eliminated by the fact that when the case went to the jury they would have to fix the damages, and a part of the damages is the conceded hospitalization, and the expenses of that.

Mr. Frank: That is correct, your Honor.

The Court: Regardless of who paid it, that is the result of it, and that is where the verdict comes in.

Mr. Frank: That is what I want to prove.

The Court: After the verdict comes in, the employer, I mean the charterer——

Mr. Frank: The charterer and the stevedore will have to settle that between them.

The Court: Yes, that comes after the verdict comes in, and after you have proved what the hospital and medical expenses are.

Mr. Behrens: But I am going to raise the point of relevancy in the main case. I am going to raise it at the point that Mr. Frank offers it in evidence.

The Court: But you see how that will place Mr. Frank in the position: He will go before the jury, and say that this man is hurt, and that he wants to recover, and the defend-[fol. 60] ants have to pay him, and they will say where are the damages?

Mr. Frank: That is right.

The Court: I can rule on your objection, and if I overrule it you have an exception, and then if the jury comes in with a verdict, we can adjust it after that.

Mr. Schwartz: We have a stipulation between us now, that is, between the plaintiff and us that has taken care of that.

(Further discussion off the record.)

Mr. Frank: The defendant, Pan Atlantic Steamship Company, will furnish to plaintiff's attorneys before the trial any copies of written statements or reports made by the second mate involving the accident mentioned in the plaintiff's complaint.

We had agreed on that.

The Court: When you offer in evidence the hospital bills as a part of your case the defendant apparently would be perfectly willing to concede the reasonableness of them, but the defendant says it is irrelevant in this case. Now, I will overrule that and give him an exception, and then the bills are produced, and we will straighten that out after the verdict of the jury. They might find that there is no liability.

Mr. Frank: That is right, then all these findings will be out.

Mr. Schwartz: We have two stipulations that embrace the third-party plaintiff and the third-party defendant, and as I understand it, Mr. Behrens has no objection to them. They were contained in my letter to Judge Raytiel, a carbon copy of which Mr. Behrens got.

It is conceded by the counsel for the third-party plaintiff and counsel for the third-party defendant that Ryan Stevedoring Co., Inc., in compliance with the terms of U. S. Longshoremen and Harbor Workers' Compensation Act, in pursuance thereto there were paid by the compensation [fol. 61] carrier for Ryan Stevedoring Company certain sums for compensation and $9,857.36 as medical expenses, the reasonableness of which medical expenses is conceded by all concerned.

The Court: That is right.

Mr. Behrens: That is correct.

Mr. Schwartz: The second provision we have agreed upon is that all proof dealing with the alleged right of indemnity in favor of Pan Atlantic Steamship Corporation against Ryan Stevedoring Co., Inc., will be adduced at the trial of the action of the plaintiff herein as against the defendant Pan Atlantic Steamship Corporation, and that the determination of the claim for indemnity in the third-

party complaint of Pan Atlantic Steamship Corporation, shall be submitted as a question of fact and law to the Judge who tries the action of plaintiff as against Pan Atlantic Steamship Corporation.

The Court: That is exactly what we have suggested.

Mr. Behrens: Yes.

Mr. Schwartz: Now we have an agreement on the record.

(A jury was duly empaneled and sworn.)

(Adjourned to Wednesday, February 4, 1953, at 10:30 o'clock A. M.)

[fol. 62] Trial continued.

(Counsel for the respective parties open to the jury.)

Mr. Schwartz: I will waive any opening at this time on behalf of Ryan.

Louis Salvatore, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Frank:

Q. Mr. Salvatore, I want to ask you at the very outset to talk good and loud so that if I can hear you why the ladies in the extreme corner will also hear you, and the Court will hear you.

How old a man are you?

A. 34.

Q. What is your occupation?

A. Longshoreman.

Q. Since when have you been a longshoreman?

A. Since 1946.

Q. What did you do before that?

A. I was in the U. S. Army.

Q. How many years were you there?

A. Three years and eight months.

Q. What did you do before that?

A. I worked in the Navy Yard.

Q. Ever since you have been a longshoreman where have you been employed?

A. With Ryan Stevedoring, on Ryan dock, Pier No. 6.

Q. Let us get that straight: That is Pier 6, Bush Terminal docks in Brooklyn?

A. Yes.

[fol. 63] Q. And you call it the Ryan Stevedoring Company; is that also known as the Waterman Steamship Company?

Mr. Behrens: I object to that as incompetent and immaterial.

Q. All right. Have you worked as a longshoreman since 1946 continuously for Ryan, or do you go from pier to pier and get work as longshoremen do?

A. When it is slack here I go to other piers.

Q. In other words, in the longshore business when there isn't a ship in at your pier for you to work you go to another pier hoping that you will get a job there?

A. That is right.

Q. But since 1946 up to now most of your work has been at this pier?

A. Yes.

Q. Now, the Canton Victory came in on the morning of the accident; is that right?

A. That is right.

Q. And we have all agreed that is on July 20, 1949. What time did you men shape up there?

A. 7:55.

Q. Five minutes before 8?

A. That is right.

Q. And a shape up system is one where the men appear before what you call a hiring boss; is that the idea?

A. That is right.

Q. And he hires you?

A. That is right.

Q. Let me ask you at this time, this is something I think that I didn't tell the jury about. You men work as a unit, do you not? In other words, what I mean by that, Mr. Salvatore, do you always work with the same men wherever possible?

A. Yes.

Q. And where for instance you are working in hatch No. 3 gang, they worked as often as possible with the same men in that gang?

A. Yes.

Q. Unless a man doesn't report because of illness, and then you take a substitute?

A. That is right.

Q. Is that the idea?

A. Yes.

[fol. 64] Q. That is the way it is done on the waterfront?

A. Yes.

Q. So I take it you have worked with this same gang for quite a while?

A. I have worked with the same gang for a long time.

Q. I told the jury certain things about these operations, but we have got to get all of this down on the record. I just want to ask you some questions on this.

The vessel involved here, which is the Canton Victory, had you worked on that ship before, do you remember?

A. Yes.

Q. Did you come to know some of the officers on the Canton Victory?

A. Yes, the second mate, Fischer.

Mr. Frank: Is he here?

Mr. Behrens: He is not in the courtroom, but his vessel arrived yesterday and I will have him in court tomorrow morning.

Q. You know him?

A. Yes.

Q. And he knows you as I understand?

A. Yes.

Q. He was at that time the second mate of the Canton Victory?

A. I believe so.

Q. Now, the Canton Victory is a double-decker; by that I mean it has two 'tween decks, is that right?

A. Yes.

Q. An upper and a lower 'tween deck?

A. Yes.

Q. And for the purposes of this trial it is agreed, Mr. Salvatore, that the distance between the main deck and the first 'tween deck is ten feet, that is about your idea, is it?

A. Approximately.

Q. And then between the upper 'tween deck and the lower 'tween deck it is another ten feet?

A. Right.

Q. And between the lower 'tween deck and the hold, that is the cargo hold itself, the bottom, the distance is 14 feet?

A. That is right, sir.

Q. Tell me, have you any idea, it is a little difficult for me to read blueprints, maybe we can get away from that [fol. 65] Have you any idea as to the size of the hatch, that is, the square up on the top?

A. No, I couldn't say.

Q. All right, we will prove it some other time. Now, your gang was sent to work where on the morning of this accident?

A. No. 3 hatch, after end.

Q. Was there another gang sent in the forward part?

A. Yes.

Q. Will you tell the jury again, the after gang consists of how many men altogether?

A. Eight men down the hold, three men for the winches.

Q. Eight and three, that is eleven. We will try to count these as we go along.

A. And one gangwayman.

Q. That is 12.

A. And then there are the dock men and the hatch boss.

Q. How many dock men are there?

A. Eight men on the dock.

Q. Yes. That is about 21 men altogether, isn't that right?

A. Correct.

Q. Isn't that a recognized gang under union rules, as well as everything else along the waterfront?

A. Yes.

Q. So you had 21 men in your gang, a 21-man gang on the after part, and a similar gang on the forward part, is that the idea?

A. That is about right.

Q. In connection with your work was Palazzolo a member of your gang?

A. Yes.

Q. Now, you said you had eight men in the after gang down below?

A. Yes.

Q. Did you divide that into two gangs, these eight men that you had there?

A. Yes.

Q. How was that done?

A. Four men on the inshore and four on the offshore side.

Q. The inshore gang is the gang that is next to the dock?

A. Correct.

Q. And the offshore gang is the gang away from the dock?

A. That is right.

[fol. 66] Q. During the progress of work, Mr. Salvatore, on this particular job, let us talk about this job, you unloaded or discharged the cargo where, to the dock or——

A. To the dock.

Q. And was it to the upper dock pier or the lower?

A. The uppier dock.

Q. There is a loft on that pier, is there?

A. That is right.

Q. And after the winches discharged the cargo into the upper loft, they were taken away by Hi-Los?

A. Yes.

Q. Hi-Los are tractors like?

A. Yes.

Q. That is something that you have done a good many times?

A. That is right.

Q. On the Canton Victory, as well as on other ships, is that right?

A. That is right.

Q. I want you to start at the beginning. When you men got on the ship was the upper 'tween'deck all clear, or was there still some cargo left, if you can remember?

A. The square of the hatch was clear, but there might have been a little cargo in the wings, but I am not too sure of that.

Q. That is all right, it isn't too important. As far as the lower 'tween deck was concerned, was that full?

A. We took some cargo out of there.

Q. Out of the lower 'tween deck?

A. Yes.

Q. Did you take any pulp out of the lower 'tween deck?

A. Yes.

Mr. Frank: Mr. Behrens, do you have the cargo plan? This one was furnished me by your office. Have you any objection to it going in now? Is there any explanation that you may have to offer about it at this time?

Mr. Behrens: No, I would have no objection to it. I do not know if Mr. Schwartz has any objection.

Mr. Frank: Oh, I am sorry. I didn't show it to him. [fol. 67] Mr. Schwartz: I have no objection.

Mr. Frank: I ask that it be marked in evidence.

(Cargo plan marked Plaintiff's Exhibit 1 in evidence.)

Q. According to Plaintiff's Exhibit 1 in the lower 'tween deck you had 49 tons of pulp. Let me ask you this: 49 tons of pulp is from your experience in working around a ship about how many rolls would you say?

A. Of course they vary in size, say about 40 rolls; 35 or 40 rolls.

Q. In other words, about that many?

A. Yes.

Q. In the lower hold according to Plaintiff's Exhibit 1, the cargo plan, you had 465 tons of pulp. 465 tons is about how many rolls would you say?

A. That would almost fill up the whole lower hold.

Q. I know that, but what I meant was this: About how many rolls would you say that was offhand?

A. Well, that is real hard to say.

Q. All right, we may be able to get it later.

In taking this cargo out, you, Palazzolo and the two others comprised the offshore gang, is that right?

A. That is right.

Q. That was the after gang?

A. Yes.

Q. Then there were four on the inshore side?

A. That is right.

Q. Tell me this, there is no use in going all the way through the ship. We have cleared out the 'tween deck, and now you are down in the lower hold. Will you tell his Honor and the jury, how you started clearing out the square of the hatch?

A. We take off the hatch covers, uncover the hatch, and the beams, remove the beams, and we start with the winch coming down, and we just hook up the rolls and they take them out of the square hatch.

Q. Let us get that. In other words, when you get down to the lower hold, you do what, you stand right on the rolls, is that right, you and the men that are with you there?

A. Yes.

[fol. 68] Q. Then the winch comes down, I mean the hook, the hooks come down and you men attach the hooks to one of the rolls, and left it out?

A. That is right.

Q. It is lifted out by an electric winch?

A. That is right.

Q. The winchman, can he see where you people are working down there?

A. Yes.

Q. Is there a lever control?

A. Yes.

Q. And the control lever, is that right close to the edge of the hatch, or to the coaming?

A. Right at the coaming.

Q. The coaming is the edge of the hatch, is that right?

A. That is right.

Q. You see a lot of these terms are not known to the general public, and we want the men on the jury, and the ladies to understand what you are talking about. The coaming is the fence around the hatch.

A. That is right.

Q. So that he looks right down?

A. Yes.

Q. Does he pick up as soon as you hook on, or must you give him a signal?

A. He waits for our signal before he takes it up.

Q. He always does that to make sure that the hooks are in properly.

A. That is right.

Q. These hooks, when they start lifting do they tighten up?

A. Oh, yes, they tighten up at both ends.

Q. Those hooks are attached to wire cables, is that the idea?

A. That is right.

Q. And do you always remove—we are talking about these rolls now of pulp, do you always remove the same amount, or do you vary, sometimes one, sometimes two?

A. Sometimes two.

Q. We haven't gotten to the sizes yet. The sizes you say vary?

A. Yes.

Q. What is your idea of the longest in size?

A. The longest, about six feet.

Q. About six feet, and what in diameter?

A. About four feet.

[fol. 69] Q. In other words, are all of them more or less the same diameter?

A. Approximately, about the same.

Q. About the same. The longest you say is six feet. Are there some less than six feet?

A. Yes.

Q. What?

A. Maybe about five feet.

Q. And others?

A. Four feet, they vary, they come in different sizes.

Q. What is your idea of the weight of them, how do they vary, from what to about what?

A. I would say 1,500, 1,700, 1,900, 2,300, 2,400, there were all different sizes.

Q. Do they come as much as a ton and a half?

A. Yes.

Q. The one that fell on Palazzolo, I am getting ahead of my story, have you any idea what the weight of that was?

A. About 2,300 pounds.

Q. You say 2,300 pounds?

A. Yes.

Q. Was that one of the large ones?

A. Well, we would call it large, yes.

Q. During the course of the work that you men were doing; talking about this particular job, this cargo, we have already gotten down to the hold, we are through with the lower 'tween deck, was the entire hold so far as you could see filled with these rolls?

A. Yes.

Q. You have worked there since 1946, is that right?

A. That is right.

Q. Both Mr. Behrens and I have used the word "chime" system. Have you ever heard the word "chime" system before?

A. No, sir.

Q. How were these rolls stowed, how would you call it?

A. I would call it, they were tiered up.

Q. Are you also acquainted with the flooring off system?

A. Yes.

Q. Have you seen both systems used on these ships that come in at this pier?

A. Yes.

Mr. Behrens: I object to the form of the question.

The Court: These ships?

[fol. 70] Q. On ships, let us put it this way, those that you have worked on the Pan Atlantic ships, or ships discharged by Ryan Stevedoring Company at Pier 6, you have worked on those ships, haven't you?

A. Yes.

Q. Have you seen paper, pulp come in on those ships, and helped in the discharge of it?

A. Yes.

Q. And have you seen both systems used in there?

A. Yes.

Q. By the Pan Atlantic Steamships, that is the chime system, as they call it, which you call the tiering system, as well as the flooring off system?

A. That is right.

Q. The flooring off system, how is that done? Have you seen the way that is done?

A. Well, they have it floored off with rolls of pulp all over the hatch.

Q. You mean that you put the rolls of pulp down on the bottom?

A. That is right.

Q. And then, you get it all filled up, is that the idea?

A. Yes.

Q. And then you do what?

A. Then you make a floor with planks.

Q. A regular floor?

A. That is right.

Q. What type planks?

A. They are about two inches, they vary in size; maybe about this wide, maybe about that wide (indicating).

Q. I do not know what this and that means. What is your idea of the width of some of these planks?

A. Say about ten inches.

Q. And some others, they sometimes wouldn't measure ten inches, is that right?

A. Yes.

Q. You certainly didn't show ten inches with your hands there when you did that.

A. They are about this size, and some about that size.

Q. What is this size and that size?

A. About six or seven inches.

Q. Six or seven inches, that is your idea of their size?

A. That is right.

[fol. 71] Q. How long are these planks?

A. About ten feet.

Q. And you say they are about two inches thick?

A. That is right, yes.

Q. After you have leveled off the entire row, then you put the planks on?

A. That is right.

Q. After the planks are on that is the floor, is it?

A. That is right.

Q. And then you put other rolls on that?

A. That is right.

Q. And then you do the same thing again?

A. Yes.

Q. How many floors can you get in a hold like the Canton Victory, bearing in mind that the size was 14 feet?

A. About three high.

Q. That is the average, all of them do not come to the same amount?

A. No, sir.

Q. Some are heavier than others?

A. That is right.

Q. Some ships have more in them than others also, is that right?

A. Yes.

Q. Some are more heavily loaded than others?

A. That is right.

Q. Did you also have some general cargo on this Canton Victory when she came in?

A. Yes.

Q. Do you happen to know, do you remember whether or not you had general cargo down below in hatch No. 3, or was it all covered with pulp?

A. You mean down in the lower hold?

Q. Yes.

A. I don't remember any general cargo down there.

Q. Good enough. Now, tell me this, what is the first thing that you do in removing this pulp, I mean what part of it do you clear first?

A. We clear the square.

Q. The square? What is that?

A. The square of the hatch.

Q. That is the part under the opening?

A. That is right.

[fol. 72] Q. Well, what for? Why?

A. That is the only way we go down, because it is a pyramid type, you know.

Q. Just a minute—a pyramid type?

A. Yes, it comes wide at the bottom, and goes up narrower under the wings.

Q. You mean up under the wings it is narrower as it goes up?

A. Yes.

Q. And you call that a pyramid type?

A. That is right.

Q. It is wide at the bottom and gets narrower as you go up?

A. Yes, it is narrower against the side of the ship, against the sweat boards of the ship.

Q. So first you have to clear the square of the hatch out; is that the idea?

A. That is right.

Q. Eliminating that, I want you to forget the pyramid or tiering off, and let us get back to the flooring system. You have discharged ships with the flooring system?

A. That is right.

Q. Many a time?

A. Yes.

Q. I want to ask you this, how do you do that, when you have the flooring system?

A. We clear the square of the hatch, and when we get in the wings, you see, we roll them out.

Q. You can roll them out?

A. That is right.

Q. Out into the square?

A. That is right.

Q. Because they are all on an even floor?

A. Yes.

Q. After you get them rolled out in the square and they are lifted up, what do you do with the planks then?

A. Pick up the planks, make draft of them and they take them out of the hatch.

Q. You tie them together, and lift them up on the top deck, is that the idea?

A. That is right.

Q. Then down comes the hooks again, and you do the same thing with the second row; is that right?

A. With the second row, second tier or whatever you call it.

Q. In this particular instance they were what you call pyramided or tiered; is that right?

A. In tiers, that is right.

[fol. 73] Q. So the first thing you did was to clear down to the square of the hatch so you could get under the wings; is that the idea?

A. That is right.

Q. Tell me why it is that you can't put your hooks down, right where you go back to get hold of the paper?

A. Because it would damage the rolls, we cannot do it, we are not allowed to do that because it would damage the cargo.

Q. You are not permitted to do it?
A. No, sir, it would tear up all the paper.
Q. You started at 8 o'clock, and some time you men knocked off for lunch; what time was that?
A. 12 o'clock.
Q. From 12 to 1?
A. Yes.
Q. And then you got back to work at 1 o'clock, is that right?
A. That is correct, yes, sir.
Q. About what time did the accident happen?
A. About 4 o'clock.
Q. In the afternoon?
A. Yes.
Q. Incidentally, what kind of a day was it?
A. It was a hot day.
Q. Very hot?
A. Real hot day.
Q. During the course, around the time, around 4 o'clock, what was the name of your hatch foreman, incidentally?
A. Domico, Tom Domico.
Q. Have you worked with him before and since?
A. Oh, yes.
Q. That is part of your gang?
A. That is the gang, yes.
Q. Do you get any instructions as to how late you are going to work from him?
A. Yes.
Q. Did you at this time?
A. Yes, we did, he hollered down to us.
Q. What did he holler?
A. He hollered down that we were going to work until 6 o'clock.
Q. And did you answer him?
A. We hollered back. We refused to work until 10 o'clock because it was too hot, and we were exhausted.
Tol. 74] Q. As a matter of fact around 4 o'clock in the afternoon, do you know as a matter of fact the temperature was about 86 degrees around 4 o'clock on the day of the accident?
A. I know it was very hot.

Q. Tell me, what difference would that make, the fact that it was hot, when you do that breaking down of cargo?

A. We are always on the run down there.

Q. What do you mean by that?

A. Well, it is a dangerous job, and it isn't an easy job at all. You just do your work, and you are calm, but it wasn't like that, you are on the alert all the time, and you are on the run all the time, and it is very dangerous.

Q. If you didn't work overtime what time would you quit?

A. 5 o'clock.

Q. 5 o'clock is the actual quitting time?

A. Yes, 5 o'clock.

Q. You men like to work overtime and get paid for it?

A. Yes.

Q. You get more money, don't you?

A. Oh, that is right, yes.

Q. Did all the men holler up to him, or just some of them?

A. All our gang, we all refused to work until 10 o'clock.

Q. Did there finally come a time when you had almost cleared the square of the hatch?

A. Yes.

Q. Around what time was that?

A. Around about 4 o'clock.

Q. Just about the time of the accident?

A. Yes.

Q. When you say cleared, was it entirely cleared, or was there some left?

A. We had some left in the square yet.

Q. You had some left to be taken out?

A. Yes.

Q. After you cleared the square of the hatch, what was the next thing that you have got to do?

A. We would start clearing the wings.

[fol. 75] Q. Start clearing the wings, tell me how you would start, and have I your Honor's permission to come forward?

The Court: Yes.

Mr. Frank: May I use this exhibit?

The Court: Yes. Is there any objection to that exhibit?

Mr. Behrens: It hasn't been marked as an exhibit yet. I assume it is just for illustrative purposes.

Mr. Frank: You are right, it has not been marked. It was marked in the last case Plaintiff's Exhibit 1, but I will ask that it be marked as an exhibit now.

The Court: Let it be marked as an exhibit in this case.

(Marked Plaintiff's Exhibit 2 in evidence, being a model of the hatch produced by Mr. Frank.)

Mr. Frank: These small pieces of wood that I used to represent rolls of pulp do not have to be marked, we can all use them.

Mr. Behrens: All right.

Q. Now, you know more about this than I. Let us assume you are under the wings, would you put a couple of tiers there? Let us have some more, will you?

(Mr. Frank places more pieces of wood in front of witness.)

Q. Now, I will help you by holding it. Let me ask you this: In normal times when they would use the tiering system, and they do, don't they?

A. Yes.

Q. How do you chock those under there normally, what do you use for chocking?

A. Normally we would use a wedge.

Q. A wedge?

A. Yes.

fol. 764 The Court: What do you mean by, normally? Customarily?

Mr. Frank: Customarily is the word I meant, your Honor.

The Court: Is that right?

The Witness: Yes, sir, customarily.

Mr. Frank: Customarily is the better word.

Q. I show you this drawing which was made by Mr. Fischer. Is that the idea of a wedge?

A. Yes, sir.

Q. That you see here?

A. Yes.

Mr. Frank: Have you any objection to my offering this?
Mr. Behrens: Not at all.

(Drawing marked Plaintiff's Exhibit 3, in evidence.)

Mr. Frank: Do you see it. All right? It is just what I described to you. Do you see it all right (addressing the jury)?

Q. That is the customary wedge?
A. Yes.

Q. All right. Assuming you are breaking down the cargo there and you have the customary wedge, when you get underneath the wings how do you men get the rolls out?

Mr. Behrens: I cannot see the witness.
Mr. Frank: I am sorry.

Q. I want you to use this for your purposes here. You have got a wedge underneath now.

Mr. Behrens: I won't be able to see it.
Mr. Frank: Why don't you come over here for the illustration.

(Mr. Behrens moves closer to witness.)

Mr. Frank: Can you see now?
Mr. Behrens: Yes.

[fol. 77] Q. Assume you have a wedge, where are the wedges customarily placed?
A. There would be one on both ends.

The Court: What is a wedge?
The Witness: A wedge is in this form (indicating), it is used to chock this pulp.
The Court: I mean it is made out of wood?
The Witness: Yes.
Mr. Frank: As well as we can tell from this, it is about a foot in length as indicated by the figure made there, and about eight inches high?
The Witness: Yes, about that.

Q. How thick, and how wide?
A. About that wide (indicating).
Q. About two or three inches, something like that?

A. Yes.

Q. Now, will you go ahead. What did you do in breaking down, as you say, a pile?

A. We pull out the wedge which is in there, just work this out with the bar (demonstrating).

The Court: You can stand up if you want (addressing the jurors).

The Witness: It would be worked out this way (demonstrating).

Q. Do it.

A. We pull the wedge out a little at a time, until these rolls would come down here (indicating), and then they roll right out, and the wedge would stay there.

Q. In other words, you ease the wedge away?

A. Yes.

Q. When you are using the customary type of wedge, is that the idea?

A. Yes, that is right.

Q. When you ease it up, you men who are doing that, where have you got your eyes?

A. We are watching all over.

[fol. 78] Q. Why do you watch this particular breaking down, will you explain that to the jury?

A. Because it really is dangerous, if they do not use this type of wedge—

Q. Let us talk about even with the wedge.

A. Well, it comes down with a real force, it comes down that way (indicating) with a force, and sometimes comes out this way into the square.

Q. That is why you have got to be careful?

A. Yes.

Q. That is why you have to watch?

A. That is right.

The Court: You are standing under the open hatch?

The Witness: In the square of the hatch.

The Court: In the square of the hatch?

The Witness: Yes, sir. You see this all covered over (indicating), and there is no other place for us to stand.

The Court: Do you do that by hand, or do you do it with a tool of some kind?

A. We have a wooden bar.

Q. And you work that wedge out?

A. To work the rolls out that way.

The Court: At the time you are pulling out the wedge you are pushing back the pulp?

The Witness: Yes, sir.

The Court: That way (demonstrating)?

The Witness: Yes, sir.

Mr. Frank: So eventually it is all leveled out?

The Court: You mean to tell the jury that when you are doing that you are looking up the open hatch?

The Witness: We are looking all over.

The Court: You are watching the hatch? Aren't you watching what is happening down there?

The Witness: We are looking all over, including the hatch itself.

I do not think you understand the Court's question.

Q. There comes a time when you have to watch the open hatch?

A. Yes.

[fol. 79] Q. When is that?

A. That is when the draft is going up.

Q. But that isn't what his Honor said. What he wants to know, when you are doing this, at the time you are doing that is a draft going up at that time?

A. Yes.

Q. So what do you watch when you are doing that?

A. Watch this right here, because we have to watch this.

Q. That is even with the customary wedges?

A. That is right.

Q. Tell me this: Do you remember, Mr. Salvatore, as to whether or not at the time when this accident occurred was the ship perfectly level or was it at a list?

A. There was a list.

Q. List which way?

A. This way (indicating).

Q. This way does not mean anything.

A. The list was against the offshore side.

Q. You were on the offshore side?

A. Yes.

Q. That means it listed up and toward the inboard side, is that what you mean?

A. That is right.

Q. Having that type of list, was it much of a list or not too much?

A. It was enough of a list.

Q. Enough for what?

A. To make it more dangerous for these rolls to fall that way, carrying more danger.

Q. You mean it was much more important to have the wedges there?

A. Yes.

Q. Let me ask you this: At the time of the accident what were you and Palazzolo doing, what had you done?

A. We had just finished up hooking a roll of pulp, and it was going up the hatch and we were standing in the square watching the roll go up.

Q. When a draft goes up must you men watch it?

A. Why not? We are working right in the square of the hatch, as there is no other place to go but in the square of the hatch and we have to watch it.

Q. When you say you have got no other place to go, what other place is there?

A. The wings on either side.

[fol. 80] Q. Were the wings empty so that you men could stand there in the wings?

A. No, sir.

Q. The wings had cargo in them?

A. These rolls of pulp were in the wings.

Q. In the wings would be the customary place to stand, but in this case the stuff was partly in there; is that the idea?

A. That is right, yes, sir.

Q. Tell me, you say you had just hooked up a roll, do you know was it a big or a small roll? Do you remember the roll?

A. They vary in size. I just don't remember what size was that particular roll.

Q. All right, that is good enough. After you had hooked it up did the winch take hold?

A. Yes.

Q. Who signaled, you or Palazzolo?
A. I signaled.
Q. What was your signal?
A. This way (indicating).
Q. Just with your finger?
A. To go up, that is right.
Q. Then did it start going up?
A. Yes.
Q. Then what happened?
A. Then I heard a rumble. I heard some noise and I thought the paper was moving.
Q. Yes.
A. And I happened to see the paper move, and as it was moving I seen it move, and I hollered, as I seen it move I hollered watch it, and the first thing I know the roll come out this way, and Frank couldn't go anywhere. He was right up against another roll in the square. There were three or four rolls in the square, and he couldn't move very far. And that roll came out so fast that it knocked him down and rolled right over him.
Q. The list of the ship was toward the inshore side?
A. Yes, and the pulp rolled that way (indicating).
Q. Was that wedged by the customary wedges?
A. No, sir.
Q. What did they have to wedge it with?
A. They had pieces of dunnage.
Q. Suppose we get the size of it. What is the thickness [fol. 81] of the dunnage that they wedged under there?
A. I would say about three-quarters of an inch, may be less.
Q. How big?
A. They never used those big pieces for that. It is only small pieces.
Q. How do they vary in size?
A. They vary in size, yes. Sometimes they have pieces a couple of feet long, and sometimes a little longer.
Q. Did you look out then? You said a little you were looking out before a rumble?
A. [illegible]
Q. [illegible] as to what caused the rumble?
A. [illegible] was it came from the forward

end. The gang that was working on the forward end were starting to finish clean their wings.

Q. In other words, the gang at the forward end had gotten ahead of your men?

A. Yes.

Q. They were starting to clear their wings?

A. Yes.

Q. They had already cleared the square of the hatch, their part?

A. Yes.

Q. And you were still clearing your square?

A. Yes.

Q. That is alone before you start under the wings, you clear the square entirely?

A. Yes.

Q. That is what you have to do?

A. Yes, that is right.

Q. When you cleared the square of the hatch then you would do the same thing, clear the wings?

A. Yes.

Q. Start under the wings?

A. Yes.

Q. This forward gang also consisted of four men, is that right?

A. That is right.

Q. There were four men on the forward gang offshore, on the offshore side?

A. Offshore, that is right.

Q. What did you see them doing there at that time?

A. They were working out the pulp with a bar, the same way that I showed you, and the first thing I know the pulp came out and disturbed that tier, it disturbed that tier. [fol. 82] Q. Which tier are you talking about, the one that fell over? Suppose you make this one the tier that they are working on (using blocks).

A. All right, it was two rolls over.

Mr. Frank: Can you see it now (addressing the jury)?

Q. In other words, the forward gang was working

A. About here (indicating).

Q. About here (indicating)?

A. Yes.

Q. So the jury can get the idea, which is the tier that broke down, is it the tier that struck Palazzolo, the tier that they were breaking down?

A. No, that was right here.

Q. In other words, it was one tier beyond that rolls one tier going over this way?

A. Yes.

Q. Did the forward gang start here and work forward, and did your gang start there and work aft? Is that the way that you did that?

A. Yes, sir, they would start from here over and we would start from here over this way (indicating).

Q. Would you now indicate what you saw as far as the forward gang is concerned with that forward pile, do you know whether they had wedges there or not?

A. I do not know.

Q. That is what I call the customary wedge. Did they have the customary wedges on their pile, or don't you know what they had?

A. I really don't know what they had.

Q. Good enough, but whatever they had, what happened?

A. I seen them working out, and the pulp was going this way, and as they were working it out this tier started to come down, and it shot right out this way and went over Frank. That is all I noticed about it.

Q. Actually had you seen before the accident what kept the front rows in place, what was it that kept them?

[fol. 83] A. Well, the rolls of paper that was in the square would actually hold this.

Q. But after you cleared the square, what would hold them?

A. They left some dunnage there, just dunnage.

Q. Do you happen to remember what type of dunnage it was?

A. There was one piece of dunnage to take care of two rolls.

Q. When the roll started to move, what became of the dunnage?

A. It went right over the dunnage.

The Court: What is this dunnage, is it just a lot of wood?

The Witness: Just scrap wood.

The Court: It wasn't built like that design you have there?

The Witness: No.

The Court: That is what they gave you to use?

The Witness: Well, those wedges that come in at times, they didn't have any at this particular time, they just had dunnage there.

Q. His Honor's question, I am afraid that you misunderstood it. I know what your Honor is after. You say that they were easing them off this, and they were using a bar to break it down?

A. Yes, sir.

Q. Will you describe those bars to the jury?

A. They are about—say about this high from where I am standing, I think about four feet high.

Q. You are not very tall, are you?

A. About five feet, four. They are about four or five feet high.

Q. You are pretty small for a longshoreman.

A. That is right.

Q. You had a wooden bar?

A. That is right. The end that we use to break down is shaped sort of like a chisel.

Q. And that is what you use to ease the rolls?

A. Yes, sir.

[fol. 84] Q. That is not what is used as a wedge?

A. Oh, no, that is the bar.

Q. His Honor wanted to know that, that is not dunnage, those bars?

A. No, sir.

Q. Those are regular bars?

A. That is hard wood.

Q. When you used that stick to illustrate dunnage, when you used that you were using the same piece of wood that you used as a bar. Now, when you are describing dunnage you have something else in your mind than that bar?

A. Yes, sir, just an ordinary piece of wood, scrap wood.

Q. So that we do not get all mixed up, will you give him some dunnage?

(Some small pieces of wood were handed to the witness.)

Q. Dunnage, you say, comes in all sizes?
A. Yes, sir.
Q. It is discarded wood, isn't it?
A. Yes, sir.
Q. Always used on board a ship?
A. That is right.
Q. In other words, what you say is one piece of dunnage held two of the rolls?
A. That is right.
Q. And when this one broke down, this one started rolling (indicating)?
A. Yes, sir.
Q. Which one started rolling, the one over here?
A. This one right here first.
Q. And then the next one?
A. Yes, sir.
Q. And you saw it roll, you say?
A. Yes, sir.
Q. And then do you say that you hollered?
A. Yes, sir.
Q. Did the other men holler?
A. Yes, sir.
Q. You had two other men in your gang; is that right?
A. Yes, sir.
Q. They are here, aren't they?
A. Yes, sir.
Q. Just to get them correct, would you give us their names?
A. Jerry Machese and John Kraynock.
Q. How do you spell that?
A. K-r-a-y-n-o-c-k.
Q. And Palazzolo?
A. Yes, sir.
Q. That was the gang; there were four men in it?
A. Yes, sir.
Q. Including yourself?
A. Yes, sir.
Q. When you hollered did the other men holler, too?
A. Yes, sir.

Q. Did Frank hear you holler?
A. Yes, sir.
Q. What did he do?
A. He tried——

Mr. Behrens: I object to that.
Mr. Frank: I am sorry.
Mr. Behrens: I object to whether the plaintiff heard him holler or not.

Q. Let us put it this way: Did you holler loud?
A. Yes, sir.
Q. All right. What did you see Frank Palazzolo do when you hollered?
A. When I hollered we all started to scatter. Frank tried to get away, and he couldn't get away fast enough because the roll was then on top of him.
Q. Now, what happened after that?
A. After that we all rushed over and tried to lift the roll up that was lying on Frank. We couldn't do it. So we had the hooks come down, they were right there, and we lifted up the roll, and took it away from Frank after we had fastened the hooks in the roll and they had taken it away, and he was lying there, and we had them send down a pallet——
Q. That is a platform?
A. Yes.
Q. That they use for purposes like that?
A. Yes, sir.
Q. That was lowered down?
A. That was lowered down, and we placed Frank on the platform, and I went up with him on the platform, and he was laid out there, and I think the Captain and Mate Fischer were up on the deck, waiting for the pallet to come up with Frank on it. They gave him a shot of morphine in the arm, and then he was lowered down to the lower deck.
Q. Right on the lower deck?
A. Yes, sir, he was lowered down to the lower deck, and [fol. 86] they had a four wheeler there and they laid the platform on it, and he was laying down there, and there was a doctor there who attended him waiting for the ambulance to come and take him.

Q. There is always a pier doctor there?

A. Well, he was not far from it and was just able to get there first.

Q. As this pallet went up, did you go up with him?

A. Yes, sir, I was on the pallet with him.

Q. How did he look to you? Was he conscious so far as you can remember?

A. Very little.

Q. Were you able to talk to him—or was he able to talk to you?

A. Well, he was moaning a lot.

Q. Did you go along with him in the ambulance?

A. No, sir.

Q. He was taken to the Norwegian Hospital?

A. I believe he was.

Q. All right. It isn't important. Tell me this: What did you do then?

A. I went back on the ship and I asked——

Q. Did your men all go back to work?

A. Well, the men were down in the hold already, the other two of them, they were down there and I was the one that left the hold to go up on the pallet with Palazzolo. And when I came back I asked them to bring up my clothing, because I just couldn't go down there again.

Q. Yes?

A. Then the stevedore came up on deck.

Q. Who is that?

A. The stevedore?

Q. Yes. Is that the hiring boss?

A. Yes.

Q. What is his name?

A. Alex Ostiescwiecz.

Q. Did your men finish your work that night or——

Mr. Behrens: I object to that as irrelevant and immaterial.

The Court: What has that to do with it?

Mr. Frank: O. K. I think that is the plaintiff's direct examination, your Honor.

[fol. 87] The Court: You will have some little cross examination, won't you?

Mr. Behrens: I beg your Honor's pardon?

The Court: I say you will have some cross examination?

Mr. Behrens: I shall. I was wondering if I might ask the witness only one question, because of the hour, so that he might have the lunch hour to see if he can find out the answer.

The Court: All right.

Cross examination.

By Mr. Behrens:

Q. You have said that you recall many vessels during the period from 1946 to 1949 coming to Pier 6 at Bush Terminal with what you call the flooring-off method; is that correct?

A. I beg your pardon?

(Last question repeated.)

A. I have seen them come in with planks in between, with plank flooring in between the tiers.

Q. And you call that the flooring-off method?

A. Yes, sir, I would.

Q. During the luncheon hour, will you please try to refresh your recollection and give me the name of any single vessel that you can recall during this three-year period, the name of any vessel and the approximate date you say she was in there, and let me know after lunch how many vessels and the approximate dates you can think of during that period that had that flooring-off method.

The Court: All right, we will take a recess now until two o'clock.

[fol. 88] AFTERNOON SESSION

LOUIS SALVATORE, resumed the stand, and testified further as follows:

Mr. Frank: I have asked Mr. Behrens if I may ask just one question that I forgot to ask him, about the scale of wages.

The Court: All right.

Direct Examination (continued).

By Mr. Frank:

Q. Since 1949 you have been employed at the Ryan docks, or whatever you call it; is that right?

A. Yes, sir.

Q. Would you be good enough to look at this for the purpose of refreshing your recollection (handing witness paper), and telling me the scale of wages in 1949 when Palazzolo was hurt; how much an hour?

A. $1.88.

Q. That is not including overtime?

A. That is not including overtime.

Q. Then there was a raise when?

A. In 1950, September, 1950.

Q. To what?

A. To two dollars an hour.

Q. And then?

A. In 1951 to $2.10 an hour.

Q. And then, now?

A. Right now we have the question pending.

Q. There has not been an agreement on the 1952 scale, but it is going to be retroactive; is that right?

A. That is right; it will be retroactive.

Q. All right. On this particular point, let me just put it this way: You did work with Palazzolo as your partner while he was working with you; is that right?

A. Yes, sir.

Q. What had your wages averaged in 1950?

Mr. Behrens: I object to that as irrelevant and immaterial.

[fol. 89] The Court: You are going to have Palazzolo here, aren't you?

Mr. Frank: Yes, sir; except he doesn't know what they obtained after he was hurt when he couldn't work any more.

The Court: All right, prove it up to the time he quit by him. Why don't you let Palazzolo testify as to what he got?

Mr. Frank: All right.

Cross-Examination (continued).

By Mr. Behrens:

Q. During the luncheon recess did you search your recollection concerning the question that I asked you?

A. Well, I don't remember.

Q. You don't remember that?

A. No.

Q. Now, as I understand your direct testimony, when you came aboard this vessel at about eight or shortly thereafter on the morning of the accident, you started up on the main deck and took off the hatch covers; right?

A. Yes, sir.

Q. Did that have anything to do with what we are talking about, the accident to Palazzolo?

A. No, sir.

Q. You say there were electric winches on the vessel?

A. Yes, sir.

Q. Did they have anything to do with this accident that happened to Palazzolo?

A. Well, the winches operated the pallet that brought him up.

Q. Did the winches have anything to do with the accident itself?

A. No, sir.

Q. You went to the upper 'tween deck, you told us, and you and your mates may have removed some cargo there. Maybe you did and maybe you did not; is that right?

A. That is right.

Q. Did that have anything to do with Palazzolo being hurt?

A. No, sir.

[fol. 90] Q. Then you got down to the lower 'tween deck

and moved some cargo there. Did that have anything to do with Palazzolo getting hurt?

A. No.

Q. Then sometime after that, as I understand, after you had gotten all the way down through the ship you took off the hatch covers from the lower 'tween deck, which is the top of the lower hold; right?

A. Yes, sir.

Q. You say you took the hatch covers off and put them to one side; right?

A. Yes, sir, that is right.

Q. Then there are hatch beams on which these hatch covers rest, and you took them out; right?

A. Yes, sir.

Q. Did that operation have anything to do with Palazzolo getting hurt?

A. No, sir.

Q. So that we get then to sometime during the day when the men got down into the lower hold; correct?

A. Yes, sir.

Q. When these hatch covers are off and the beams are out, you have an opening which you call the square of the hatch; right?

A. Yes, sir.

Mr. Frank: Please talk louder. I cannot hear you.

Q. As you stood on the lower 'tween deck after you had these hatch covers off and the beams out, you looked down into the lower hold of No. 3; is that correct?

A. That is correct, yes.

Q. When you looked down in that square of the hatch which was open what did you see?

A. Pulp.

Q. Paper pulp?

A. Right.

Q. In the lower hold?

A. Yes, sir.

Q. That was in rolls?

A. Yes.

Q. In other words there were how many tiers there at that time?

A. What do you mean?

Q. Would you tell how deep it was, whether it had been piled two or three or four deep? Could you tell as you looked down?

A. Yes, sir, at times you could; there is always [fol. 91] an opening down by the ladder; of course they do not come flush with the ladders; you can tell.

Q. So there is a ladder going down from the lower 'tween deck all the way down into the hold; is that so?

A. That is right.

Q. At that point the rolls of pulp do not come up flush with the ladder; is that right?

A. That is right.

Q. So as you look down you can tell how many tiers you have; isn't that so?

A. Yes, sir.

Q. At this point can you tell whether there is any chocking of any kind under the lower part?

A. From the top you can't.

Q. At this point, I say when you open the hatch and you look down you cannot tell if there is any chocking under those bottom rolls, can you?

A. No.

Q. The bottom tier is all covered up by the second tier, and the second tier by the third tier; isn't that right?

A. That is right.

Q. So, when you look down after you have opened the hatch, and you look down you can't tell what the condition is down underneath as to this chocking; isn't that right?

A. That is right.

Q. And I understand your testimony is that you and others of the Ryan Company went to work to clear the square of the hatch; right?

A. Right.

Q. And to clear the square of the hatch means to get all of the cargo out of that part which lies under the opening; right?

A. Just the square.

Q. Well, the square is the opening part, isn't it?

A. That is right.

Q. And the rest of it on either side you call the wings, out to the skin of the ship?

A. Yes, that is right, the wings.

Q. You and the other Ryan men then went to work to get all of those rolls out of the square of the hatch, of the opening, is that right?

A. Right, yes.

[fol. 92] Q. You say that before this accident the square of the hatch had just about been cleaned out?

A. We had two or three rolls left.

Q. Now, you say you had two or three rolls left. What does that mean, that just you, Palazzolo and the other fellows with you had those two rolls left, or were there other fellows who had rolls in the square of the hatch to come up?

A. No, in our end of the hatch there were two or three rolls left.

Q. In your end of the hatch?

A. That is right, in the after end.

Q. That is the end of the hatch that you were in?

A. That is right.

Q. The rest of the hatch up forward had been cleaned out all the way; is that right?

A. That is right.

Q. And that cleaning had been done in part by you fellows, right?

A. We do not have anything to do with the forward end of the hatch.

Q. Well, part of what had been cleaned up you fellows had cleaned in the after part?

A. The after end only.

Q. And the forward part had been cleaned up by another group working there?

A. By the forward gang.

Q. So, as I see the picture, if we were to stand right in the middle of the square of this hatch a minute or two before the accident, we would see the deck all clear in that square of the hatch except for the two or three rolls that were in the after part near you men; is that correct?

A. That is right.

Q. And if we stood there in the clear part, and we would look into one of the wings, would you describe what we would see, as we look into one of those wings?

A. You would see rolls, one on top of another?

Q. One on top of the other, about three rolls high?
A. That is right.

Mr. Behrens: May I approach the witness?
The Court: Yes, surely.
[fol. 93] Mr. Behrens? And may I have that wedge?
Mr. Frank: Yes, give him the wedge and the bar.
Mr. Behrens: I do not know which is which.

Q. This is the wedge?
A. Yes, sir.
Q. In other words, if we were standing in the square of the hatch where the jury is sitting at this time looking to the side of the ship we would see generally this picture, would we not?
A. Something like that.
Q. In what way would it be different? You would have more of them along here?
A. Yes.
Q. But I mean that is what you would see if you stood there in the square of the hatch, right?
A. At the after end of the hatch where we were working we would see that.
Q. In other words you would have, also, running all along there, you would have these other rolls, you wouldn't just have one tier, you would have perhaps eight or ten tiers running along that we would see as we walked in there in the square of the hatch; isn't that so?
A. There were only four rolls here on our end, on the after end of the hatch.
Q. On the after end of the hatch you had about four of these set up like that?
A. That is right.
Q. And then coming in the forward part about four more; is that right?
A. No, sir, on the forward end they had started to work on their end, in the wings.
Q. Yes, I will come to that in just a minute.

Mr. Frank: When you say "four," you mean on the bottom there were four rolls on the bottom, because the record does not show it when you say this and that.
Mr. Behrens: I appreciate that.

[fol. 94] Q. What would you, as a longshoreman, call this group here; would you call that a tier? We have got two set up there, and you call them two what?

A. Well, they never come in the tiers exactly like that.

Q. But what would you call them? Mr. Frank has pointed out to me that you referred to the height of the tiers as being three high; right?

A. That is right.

Q. What do you call one of rows, do you call that a tier?

A. Well, yes, you can.

Q. Now, you say in the after part, down here where you fellows were, you could see four of these set up three high; is that right?

A. That is right.

Q. And you were working out there in the square of the hatch?

A. We were working about here (indicating).

Q. Up at the forward end here they had cleared the square of the hatch and were working in the wings?

A. No, this is the after end, and this is the forward end here (indicating).

Q. Well, we can take either end of this vessel, because we didn't say if it was the inshore or offshore wing.

A. But I want to keep myself straight.

Q. That is what I want you to do. You were at the after end, and this is the after end where we are talking about. But you were down here (indicating)?

A. Correct.

Q. You are here. I say, if you stood here you could see four of these rolls or tiers; is that right?

A. That was four in our end.

Q. This is your end?

A. And then there was the after end, and here, they were starting to break in here, and there was four tiers, so that if you get two more, it would be like that, and that would give you a better picture, if you would get two more tiers in here.

Q. If Mr. Frank has got enough of these I would be glad to fix up more of them.

[fol. 95] So we will put one more in here, and one in here, and we will put a couple of little ones in here. Now, that

would you say is roughly an indication of the way the after part of the hatch was in the wing?

A. Yes.

Q. Right where you were working?

A. That is right.

Mr. Frank: I am awfully sorry, I cannot hear a word that you say.

Mr. Behrens: I asked this witness whether this generally represents the picture in the after part of the hatch in the wing right where he and Palazzolo were working, and he said "Yes," and he indicated before that they were working back here.

The Witness: Right here.

Q. Right in here.

A. Right about here, in the square.

Q. In the square of the hatch, with your backs to this stuff in the——

A. I didn't have my back to it, I didn't say I had my back to it.

Q. I am asking you if you had.

A. Palazzolo was standing here, and I was standing here (indicating).

Q. You were further aft from him; is that right?

A. Yes, sir, because we had just finished hooking up a roll.

Q. Had the winch put power on it at the time this accident happened?

A. Onto the roll that was going up.

Q. Had it actually left the deck at the time this happened?

A. Yes.

Q. That is your recollection of it; is that right?

A. Yes.

Q. You say that up forward men were breaking down another tier?

A. In here, stretching to our end.

Q. In other words, they were working in the after part instead of the forward part of the hold; is that right?

A. Yes.

[fol. 96] Q. How did that come about, that the men in the forward part of the hold were working in the after part?

A. When they are in a hurry for a ship like that they always try to wind up together. You see these gangs are working together, two gangs in the same hatch, and we try to come out at the finish at the same time, finish together.

Q. The fellows who are working in the forward part here were ahead of you fellows in the after part?

A. Yes, sir.

Q. They had already broken some of these down up here?

A. They had taken some of those out of there already.

Q. They were all out of there?

A. Yes, sir.

Q. Then as I understand it, they came to work on this tier; right?

A. Right.

Q. Which is one, two, three, four, over from the end, correct?

A. Yes, sir.

Q. You say, or did you say that they removed some blocks or chocks or something from under that end roll?

A. I didn't say they removed anything.

Q. What did you say they did with reference to that roll?

A. I said they were working that roll down like this, starting to break down. They were starting to break this down.

The Court: Stand up, Mr. Foreman, if you want to see that.

Q. They started to break it down, and to do that they removed the chock from under it?

A. There were no chocks from what I seen here, there was no chocks. There was no chocks; there was only pieces of dunnage. I didn't see any chocks in here. I just saw them just working their end this way away, and as they were working this——

[fol. 97] Q. Do you know whether they took anything out from under there first?

A. I didn't see them take anything out.

Q. You weren't watching them, were you?

A. I saw them working.

Q. I mean when the time came that they went to this

chocking or dunnage, whatever it was that was used there, you and Palazzolo were doing your own work on the other end, and were watching that, weren't you?

A. We had finished hooking up.

Q. And the draft was on its way up before this happened?

A. Yes.

Q. You say you saw them with bars on this tier working it, right?

A. Right.

Q. You saw that?

A. Yes, sir.

Q. And then what did you see happen as they were working there?

A. As I seen that happen, the men were working, I seen this go, and this here was coming down——

Q. These two?

A. I seen it move, and I yelled "watch."

Q. That was the second tier away from you?

A. I seen these rolls sort of move, and as I yelled I saw this coming out this way (indicating), it moved a bit either one way or the other; they always do; they never come down straight, or they would topple over one on top of another, but I seen that one come out.

Q. That is the third tier from the after end you saw come out?

A. Yes, sir.

Mr. Frank: I did the same thing when I was examining the witness, and I just realized, on the record, you cannot tell what this means or that means.

Mr. Behrens: It couldn't show on the record.

Mr. Frank: But I think you better ask a question and make it very clear what it is that the witness is referring to. [fol. 98] Q. I think I just asked the witness, but if I didn't I will ask again. The one that you saw shoot out was the bottom roll in the third tier forward from the after end; is that right?

A. Well, from the after end one, two, three; that is right.

Q. The third one from the after end in the bottom row moved out; right?

A. Yes.

Q. Is that the one that hit Palazzolo?

A. Yes, sir.

Mr. Schwartz: On the offshore side.

Q. This is the offshore side we are talking about?

A. That is right.

Q. And this is the one, the bottom roll of the third tier from the after end?

A. That is right.

Q. There are two other questions that I would like to ask. Mr. Frank asked you something about general cargo; what do you mean by general cargo?

A. Oh, all sorts. We have slips that come in sometimes with special cargo; there is all sizes of cases, and all kinds of cargo.

Q. You say that to your recollection there was no general cargo in the No. 3 lower hold at this time?

A. No, sir.

Q. Does that include case goods?

A. Yes, sir.

Q. Case goods would be general cargo?

A. We would call those canned goods, as far as that goes.

Q. Was there any canned goods down there?

A. No, sir.

Q. One other question: In your experience is it usual and proper or just usual to start breaking down in the wings before the square of the hatch is clean?

A. We always clean out the square first.

Q. But on this occasion the square wasn't cleaned out, was it?

A. On our end it wasn't.

[fol. 99] Mr. Behrens: I have no further questions.

Mr. Schwartz: I have no questions.

Re-direct examination.

By Mr. Frank:

Q. May I have just one or two questions?

A. Yes, sir.

Q. I am afraid that the record may not show the picture, that is why I want to make sure.

May I ask you this: The row that struck Palazzolo, was that from the pile that the men were breaking down, or was that from the pile next to the one that the men were breaking down?

A. The pile next to it.

Q. You see "this" and "~~this~~" don't mean anything. I think you illustrated before when Mr. Behrens was asking you whether they had removed the wedges, you say you do not know whether there were wedges there?

A. No, sir.

Q. Let me ask you this: Do you remove the wedges, or is it done the way you have indicated, ease it off?

A. We ease it off.

Q. That is the system that is used?

A. If there were wedges, that is the system that is used.

Q. One more thing: Mr. Behrens asked you about the names of ships that you had worked on. Let me ask you something. You are a longshoreman. Do you ever know the name of a ship unless something happens?

A. No, sir.

Q. Why do you remember that one, the Canton Victory?

A. How could I forget it, a man got hurt, you make it your business to know.

Q. Longshoremen go on a ship and don't pay any attention to the name of the ship, whatever ship is there they go on it?

A. That is right. We follow our hatch boss.

Mr. Frank: I think that is all.

[fol. 100] Re-cross-examination.

By Mr. Behrens:

Q. You mean to tell me that you can't remember the name of one single ship on which you have worked unless there has been somebody hurt on it?

A. I don't remember the names, we do not make it a habit to do that.

Q. What was the last ship that you worked on?

A. I do not even remember that.

Q. When did you last work on a ship?

A. I know I worked some day last week.

Q. And you do not even know the name of the ship that you worked on last week?

A. I do not remember.

Q. You do not remember it?

A. No, I do not remember the names.

Q. And these days, there being no war, you have got the name of every cargo vessel painted right on the side, right by the bow?

A. I don't look at it, I don't make it my business.

Q. But it is painted on there on every cargo ship, is it not?

A. I do not know.

Q. And you do not remember the name of the last ship that you worked on?

A. No, I do not.

Q. And you have been telling us about things that happened three and a half years ago?

A. Because I remember that. I remember what happens, but I don't remember the names of ships.

Mr. Behrens: That is all.

Mr. Frank: That is all.

The Foreman of the Jury: I want to get something clear in my mind. Were wedges that were used on this boat anything like the picture that we have there in the sketch?

The Witness: No, sir.

[fol. 101] The Foreman: You know that wedge that we have a picture of there, there weren't wedges like that, that were used on this boat?

The Witness: No, sir.

Mr. Frank: This is the picture that you were referring to?

The Witness: Yes, sir.

Mr. Frank: That is Exhibit 8.

The Witness: Just pieces of dunnage, scrap pieces.

Mr. Frank: That is all, Mr. Salvatore.

(Witness excused.)

GENNARO MARCHESE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Frank:

Q. Mr. Marchese, do you mind if I call you Gerry?
A. I don't care.
Q. I understand that that is what all these men call you. How old are you?
A. Thirty.
Q. For how many years have you been a longshoreman?
A. Since 1946.
Q. What did you do before that?
A. I was in the service.
Q. How many years?
A. Thirty-seven months.
Q. Had you worked as a longshoreman before you went into the service?
A. No, sir.
Q. Mr. Behrens wasn't sure how you answered. Before you went into the service, were you a longshoreman then or not?
A. No, sir.
Q. Now, since you got out of service were you always [fol. 102] at this particular pier?
A. When I started working down at the docks, I worked one day down at Pier 14.
Q. Is that in Brooklyn?
A. That is the Jarka pier.
Q. The Jarka pier, that is a well known stevedoring concern, isn't it?
A. Yes, sir.
Q. And then you went with Ryan?
A. Right to Pier 6.
Q. And you have been working with Ryan ever since?
A. Ever since.
Q. Now, I don't want to go over the entire thing again, Mr. Marchese. Jerry, I just want to get down to the thing itself.

You were a part of which gang?

A. Domico's gang, No. 6, we worked on the after end of whatever ship——

Q. What did you call it, No. 6?

A. That is No. 6 gang, yes.

Q. What do you mean by No. 6 gang? I don't get it.

A. You see, there are five gangs—six gangs altogether on the pier——

Q. Yes?

A. And on account of all the ships have five hatches, are five hatch ships——

Q. Go ahead.

A. Well, we were the gang that doubled up, with double hatches.

Q. When there is a double hatch to be worked, you worked, well, you would have a forward and after gang, and you men would go to that hatch?

A. That is right.

Q. I see. And who was your partner?

A. John Kra-nock.

Q. And you and the other three men worked as a unit together?

A. Yes.

Q. You were on the offshore side, as I understand it?

A. That is right.

Q. Now, at the time of the accident, where were you standing?

A. We were on the side more on the after end of the ship. In other words, amidships.

Q. Let us make sure we get ourselves straightened out on this. We have made this part (indicating model) [fol. 103] the inshore side. In other words, this is the dock (indicating) and this is the offshore side (indicating), and this part is the after department?

A. Yes, sir.

Q. You were where?

A. More aft, underneath the wing—not underneath the wing exactly.

Q. Right at the square?

A. In the amidships.

Q. Tell me this: Could you get under the wings?

A. No.

Q. Why not?

A. We had rolls of pulp there.

Q. All right. What was going on at the time the accident happened?

A. At the time the accident happened?

Q. Yes, just what was going on? I mean by that, were there any rolls going up?

A. Well, at the time one roll was going up, you see, and then the hatch boss came over and told the men they were going to work to 10 o'clock.

Q. Where did the hatch boss come over?

A. He was up on deck looking down.

Q. On the main deck?

A. That is right.

Q. That is where the winches are?

A. That is right.

Q. Who was the hatch boss?

A. Anthony Domico.

Q. He was your hatch boss?

A. Yes, my hatch boss. He came over, he called me and yelled down to the fellows, "We are going to work to 10 o'clock."

As we were standing on the after end, toward the amidships there, Louis and Frank were just about hooking up that roll going up, Louis was to one side and Frank was underneath, you know, right by the coaming in the square——

Q. Yes?

A. So Louis looked up as he was watching that roll going up, and then Frank came out and started yelling that he would work to 5 o'clock on account of the heat.

Q. Go ahead.

A. Then, as he was looking up, Louis and I and Johnnie, we spotted those rolls moving.

Q. What rolls?

A. The pulp in the breast of the ship.

[fol. 104] Q. You mean the pulp underneath——

Look, we have got to get all of this down, and that is why I am asking these questions. The pulp that was under the wing, do you mean?

A. That is right.

Q. You spotted it what?

A. We spotted them moving.

Q. Yes?

A. You can tell when they are moving, so we yelled to Frank to look out.

Q. Which way was Frank facing at that time?

A. He was facing upward, looking at the hatch boss.

Q. The hatch boss was hollering down?

A. That is right.

Q. And was his back toward the wing, toward the wing of the ship, Frank's back?

A. He was facing like toward the breast of the ship looking up; in other words he wasn't facing it. He was looking up and telling the hatch boss——

Q. I know. We have got that. I want to know where was his back? These piles under these things, were they in back of him or in front?

A. They were in front of him.

Q. You mean those that were going up? I think you and I don't understand each other.

Mr. Behrens: I think the witness understands.

Q. Do you understand? I want to know—let me ask you it this way: Where was Frank Palazzolo's back?

A. Toward the pulp.

Q. What?

A. Toward the pulp.

Q. The pulp. Which pulp?

A. Of the offshore side.

Mr. Frank: It is so hard to make contact.

Q. And then what happened when you saw them starting to move? Tell us.

A. We all yelled to Frank to watch out behind him.

Q. And then?

A. That rolls were coming toward him.

[fol. 105] Q. You yelled. So what happened?

A. He turned around. We started moving out of the way. Also Louis moved, and then Frank turned around and see the pulp coming toward him and he tried to get

away. There was the pulp in front of him when he was looking up, but when he turned he went into that roll.

Q. Into what roll?

A. The roll that was in the square.

Q. There were some rolls in the square?

A. Yes, sir. That roll just came from the bottom and just went right over him.

Q. Now, let me ask you this: That roll that came, that struck him, where did that come from?

A. From underneath, the offshore side.

Q. Were there a number of tiers there?

A. Yes.

Q. How did that come down? Do you know what caused it to come down?

A. Well, the other gang was working also at the same time.

Q. The other gang. You mean the forward gang?

A. The forward gang. You see, they just kept on going, kept on working.

Q. Go ahead.

A. They were breaking their rolls down, so by breaking their rolls down, with the terrific banging, it must have disturbed that other tier of rolls, and it just came right out. It disturbed them——

Q. I forgot to ask Salvatore about these rolls that we have indicated before, and I am not going to put them out there again; it isn't necessary, the bottom tier, the bottom rows, you know what I am talking about, under the wings, what did they rest on?

A. Well, there is steel, and then there may be two or three pieces dunnage higher.

Q. What do they put two or three pieces of dunnage there for? To protect the cargo?

A. Yes, sir.

Q. What is that done for, do you know? You are a longshoreman. Why do they put the dunnage there?

[fol. 106] A. On account that if water comes down there—for sweating purposes.

Q. When you men say sweat, you mean that steel decks sweat?

A. That is right, they do.

Q. Everybody knows that in the shipping business?

A. Yes.

Q. And you put dunnage under there to protect the rolls of pulp?

A. That is right.

Q. Now, when the other gang, the forward gang was breaking down their pile, whatever pile it was, how many piles were they removed from the one, the pile that was broken down, from the one of which rolls rolled on Palazzolo? Do you understand my question?

A. Would you repeat it?

The Court: Will you read that question, Mr. Karr?

Mr. Frank: I will withdraw it, your Honor. My question was a little awkward. Let me please withdraw it and state it in a different way.

The Court: All right.

Q. The roll that came onto Palazzolo came from a certain tier; is that right?

A. Yes.

Q. All right. Now, that tier was how high?

A. There were two high.

Q. The one they were breaking down, the forward gang, how many tiers away was that from the one, from the roll that hit Palazzolo?

A. From the roll that hit Palazzolo?

Q. Do you understand what I mean?

A. Yes, I understand.

Q. How many tiers away?

A. I would say about three tiers away.

Q. Now, in breaking down you have done that before, haven't you, that is where the rolls come in and are tiered [fol. 107] up instead of using the flooring system, how did you break them down?

A. By using bars.

Q. What do you——

A. Do you mean breaking down from the wings?

Q. That is what I am talking about.

A. From the wings.

Q. You use bars, and what do you do with the bars?

A. We pinch the rolls.

Q. You pinch it, is that what you call it?

A. Yes.

Q. Is that what they call it, easing it down?

A. Yes, easing it down.

Q. What happens to those on top?

A. As you ease it down, that roll just is coming down in between.

Q. Did you see any wedges of the type indicated on Plaintiff's Exhibit 3? Were there any wedges there?

A. No, sir.

Q. Did you see any wedges in the hold at all?

A. No, sir.

Q. When the forward gang broke down that pile, the one that you saw there, you said something about it coming down, and when it came down, what effect did that have on the dunnage that it was lying on? Do you understand?

A. That the other gang was working on?

Q. The other gang, you say, were breaking down the third tier away from the tier that broke down and hit Palazzolo; is that right?

A. Yes.

Q. Now, I want to ask you this: When they broke it down and the thing came down, does it come down easy? Did it come down easy or did it come down with a bang?

A. With a bang.

Q. You heard it?

A. Yes, sir.

Q. What effect did it have on the dunnage that was lying underneath the roll?

A. Sometimes if you have got two or three tiers of dunnage, you may have a hole in the spot in between that dun- [fol. 108] nage, and as she came down she gives with a terrific bang and it breaks the dunnage.

Q. Do you know whether it broke the dunnage at this time or not?

A. That I couldn't tell you.

Q. All right.

The Court: What does the dunnage look like? What does it look like? Do you mean pieces of wood?

The Witness: No. Well, your Honor, when we lay a

floor, sometimes we get good dunnage and sometimes we get dunnage. This was fairly good on the bottom tier, on top of the deck, on top of the steel deck, that was underneath the rolls of pulp.

The Court: Now, what was it? Was it wood, separate pieces of wood, or what?

The Witness: Well, regular dunnage.

The Court: We don't understand what dunnage is.

The Witness: Dunnage is lumber.

The Court: Wood? It is used for various purposes down there in the ship?

The Witness: Yes, to make floors in between cargo, or to lay down on top of the steel deck.

The Court: It wasn't in the shape of these——

Mr. Frank: Plank is the word, your Honor.

The Court: Yes, it wasn't that shape?

The Witness: No, not that thing.

The Court: No.

The Witness: It was regular inch, three-quarters of an inch, maybe thinner——

The Court: How long?

The Witness: Well, some you get five-foot long, some three feet long, some you get six or seven feet.

The Court: It depends upon what they pick up?

The Witness: It depends upon the stuff that they send down.

[fol. 109] Q. That dunnage belongs to the ship, as far as you know?

A. As far as we know, yes.

Q. Tell me, you say there were no wedges of the type indicated on Plaintiff's Exhibit 3. What did you see securing the bottom rolls under the wings?

A. Pieces of dunnage.

Q. Now you are talking again about dunnage. You see, that is why his Honor wanted to know. You talked about two types of dunnage. First, the dunnage that was on the steel deck to protect the cargo from getting wet——

A. Well, I will tell you——

Q. Go ahead.

A. As we talk from longshoreman to longshoreman, we

never say pieces of stick or pieces of lumber, we always call it dunnage.

Q. No matter what the purpose is for?

A. That is right.

Q. But his Honor wanted to know, and I think that is what he wanted to know is this, what was the type of dunnage, you call it dunnage; what was the type of dunnage that secured the rolls instead of these wedges; what were they like?

A. Well, I might as well say scrap.

Q. Scrap dunnage?

A. Yes, scrap dunnage.

Q. This piece that secured the one roll that came up on Palazzolo; do you have any idea how long it was?

A. Well, I should say around two or three feet.

Q. What is the thickness of the dunnage?

A. Maybe three-quarters of an inch, an inch, maybe less.

Q. Were you using the flooring system? You have seen the floor system used, haven't you? Have you unloaded pulp which came in by the floor system?

A. Before the accident, or——

Q. I don't know.

A. Well, after the accident we got that flooring system.

Q. After the accident?

A. After the accident.

Q. After?

A. Yes, sir.

[fol. 110] Q. I want to ask you this: When you use the flooring system, what were the floors made up? Was that also dunnage or planks?

A. Dunnage.

Q. What thickness was that?

A. Well, an inch thick, three-quarters of an inch, maybe thinner than that.

Q. You are talking about the floors?

A. On the deck, on the steel deck.

Q. You see you and I are again—well, there seems to be something wrong with me—maybe I am wrong.

I am not talking about the steel deck, I am talking about a floor that they laid over it. What was that? Was that planks or dunnage?

A. Planks.

Q. Now, those planks, how thick were they?

A. Two inches.

Q. I see. What is the size of the plank, about?

A. Six feet about, sometimes they come five inches in width, six inches, even wider or less than that also.

Q. I see.

Mr. Frank: I think that is all.

Your Honor, may I come over here? It is so difficult for me to see, and my friend's voice, which is usually good, I mean this friend of mine, well, at times he talks pianissimo.

Mr. Behrens: It is just to cause you a little trouble.

Cross-examination.

By Mr. Behrens:

Q. We will assume, Mr. Witness, that this is the offshore side (indicating), this is the square of the hatch (indicating).

I think you saw this when the previous witness was up here.

A. Yes, sir.

Q. This is now in exactly the same condition it was when he was here (indicating).

[fol. 111] We have one, two, three, four tiers. We have got them up three high. Now, is that your recollection of the general condition of it as to just before the accident?

A. Just before the accident it was——

Q. Well, now——

Mr. Frank: He started to say something else, I thought.

Mr. Behrens: I beg your pardon. I thought he had answered the question.

A. There were two more rolls up in front of that (indicates).

Q. Well now, you put the two more rolls up in front where you say they were.

A. I mean two more rolls. I am right across this way

(indicating). We had three high in the back, and as we broke it down we took one off the top and that made it two high here (indicating).

Q. I see what you mean, sir. You say that immediately here, near the square of the hatch, instead of it being three high, it was two high; right?

A. But not all the way back.

Q. As we come back here it could have been three high, couldn't it?

A. That is right.

Q. Now I think we have it. Now, you say that that would indicate it (indicating). You say that that was right close to the square of the hatch, but that when we come back further, there might be three high up in here, further under the wings (indicating)?

A. That is right.

Q. So if we are to look at these front rows, the ones that were close to you fellows, we will see two high, and then further back we would see three; is that right?

A. Yes.

Q. Now, as I understand it, you and the other three men in your gang were here in the after part (indicating)?

A. Yes.

[fol.112] Q. And the square of the hatch had not been cleared up in so far as you men were concerned, you had a few rolls left before the square would be cleared?

A. That is right.

Q. And as I understand it, the forward gang was doing some work with reference to this (indicating)?

A. That is right.

Q. Now, which one were they working on?

A. Well, they were working toward our end of the hatch, toward this here, right in this tier here (indicating).

Q. Were they working on this fourth one of the aft end, or were they working on the one further up?

A. They were working right at this other one here (indicating).

Q. The fifth one, you mean?

A. No, the third tier from where we were working.

Q. This one (indicating)?

A. The third tier, this one, this one right here.

Q. This end one?

A. That is right.

Mr. Frank: Let me see it. I can't see.

Q. They were working on this one; right (indicating)?

A. Well, yes, sir, assuming that this was the middle of the hatch. In other words, they were coming over to our side.

Q. They were working on your side of the hatch?

A. This is the half of the hatch, let us say (indicating), and they finished their half.

Q. Their half was all cleaned out?

A. Not quite all cleaned.

Q. There was a little bit way back under the wing?

A. Yes, a little way under the wings.

Q. They were ahead of you fellows?

A. That is right. As we were working there we were standing here (indicating), and Palazzolo and Louis, well, [fol. 113] we were working here (indicating). In other words, we were away from them. As that roll was going up they were working.

Q. The forward end gang was working?

A. Yes, they were working.

Q. They were breaking down a tier?

A. Yes, they were breaking down a tier.

Well, as they were breaking down this one came down with terriffic force that disturbed these here tiers right here (indicating), on account of the dunnage that they had, on account of the dunnage, on account of the scrap dunnage.

Mr. Frank: Will you read that answer?

(Last question repeated by the reporter; also the answer.)

Q. So which row or rolls came out of here, which rolls came out or roll came out, or what came out, show us here (indicating).

A. Well, as this came down——

Q. All right, let us knock this one down. In other words, this dropped down?

A. Dropped down.

Mr. Frank: You are talking about the fourth? I am only doing this for the record. This doesn't mean anything on the record.

Mr. Behrens: But the jury can see what the witness is describing.

Mr. Frank: But the record will not show it.

Q. You say, sir, that as the forward gang was working on this fourth tier——

A. Yes.

Q. And they eased this bottom one out of the fourth tier, the one above dropped down?

A. Right.

Q. Did either one of those strike Mr. Palazzolo?

A. No, sir.

Q. All right. Now, neither one of these did. Did any from this fourth tier strike him?

A. No, sir.

[fol. 114] Q. All right, which one of the remaining ones do you say came out and did strike him?

A. From where he was standing, from where Palazzolo was standing, the fourth roll from the forward end to the after end of the ship came down and hit Frank Palazzolo.

Q. Well, will you show the jury now which one it was in this pile that you say hit Mr. Palazzolo?

A. Well, I would say this one here (indicating).

Q. You have now knocked, you have taken out the bottom roll in the first of the four tiers which we could also describe as being the last tier in the after part; right?

A. Yes.

Mr. Frank: The most afterly tier going to the after part. Is that what you have described?

The Witness: But this is not the tier that is completely over, let us say, to midships. This part right here (indicating) was cleared out, this part right over here underneath—not quite underneath the wing, right here (indicating.)

Mr. Schwartz: Mr. Behrens, I don't know whether anybody has a piece of chalk, but it might help to draw a square of a hatch and see how many tiers we have fore and aft on the side of the square of the hatch.

Mr. Frank: You give us the chalk.

Q. Can you state how many tiers you had going fore and aft all the way in the square of the hatch?

A. I couldn't tell you that.

Q. Do you know how long the square of the hatch is?

A. No, sir.

Q. How many? I mean this is a Victory Ship. Do you know what the dimensions are of the square of the hatch?

A. No, I do not.

Q. This is in No. 3?

A. I couldn't tell you.

[fol. 115] Mr. Behrens: Let us see if we can get it from the blueprint.

The Court: Did you see the roll start to move?

The Witness: Yes, sir. I did see it while I was standing on the side.

The Court: You saw it?

The Witness: Yes, sir.

The Court: Was there dunnage under it?

The Witness: There was dunnage under it.

The Court: It ran over the dunnage?

The Witness: Yes, sir.

The Court: That is what I wanted to know.

Mr. Behrens: I wonder, before we get into that subject, I wonder if I might try to clarify one thing in my mind.

The Court: I wish you would.

Q. In your discussion of dunnage, is it your testimony that there was dunnage used in this case for two different purposes, two different reasons, for dunnage down under there; is that correct?

A. Yes, sir.

Q. In other words, you had underneath these rolls holding them up off the steel plates, you had boards which we call dunnage?

A. Right.

Mr. Frank: You mean the bottom rolls?

Q. The bottom rolls.

A. Yes, under the bottom rolls.

Q. Only under the bottom rolls, between the bottom rolls and the steel deck, you had dunnage, whether it ran fore and aft or thwart- do you know how it did run?

A. Yes, sir, we run it fore and aft.

Q. And then sometimes you cross it?

A. You cross it sometimes.

Q. Do you remember how that was under here that day?

A. No, sir, I don't.

[fol. 116] Q. You didn't do it, but it was underneath all of these rolls, and you have this dunnage maybe running across the ship, or running fore and aft, running in different ways, and the purpose of that is to keep the rolls of paper off the steel deck?

A. That is right.

Q. Now, the purpose for that, and that is to take it a step further, is that the steel decks will sweat, will get moisture, and if you don't lift the paper, keep the paper off the deck, it is going to get wet?

A. That is right.

Q. Then, you have another so-called dunnage situation which you have been talking about, and you say that in addition to that dunnage which was used to keep the paper off the deck, you say that dunnage was also used by being jammed in under these bottom rolls to keep them from rolling; is that what you say?

A. Scrap dunnage.

Q. Is there dunnage—well, is there a difference between dunnage and scrap dunnage?

A. You can say dunnage. I can get one six feet long and put it under that.

Q. In other words, dunnage comes all lengths?

A. Yes.

Q. Comes all widths?

A. Yes, sir.

Q. Comes all thicknesses?

A. Yes, sir.

Q. Whether you want to call it dunnage or scrap dunnage, it is the same thing?

A. Right.

Q. But what you have been saying, as I understand it,

is that instead of some kind of chocks to hold the lower rolls of pulp from rolling, there was some kind of dunnage?

A. Yes, sir.

Q. And that was used to hold it; right?

A. That is right.

Q. You say that in this tier, the aftermost tier, the bottom roll came out?

A. Yes, sir.

Q. And then?

A. It went right into Frank Palazzolo.

Mr. Frank: Mr. Behrens, what did he say?

[fol. 117] Mr. Behrens: He said it went right into Frank Palazzolo.

Mr. Frank: Mr. Behrens, you said that you put the dunnage this way. Now, don't——

Mr. Behrens: I am not trying to put it in any way. All I am trying to do is to put it in straight.

Mr. Frank: But you put something in straight which this witness didn't say. That is not how the dunnage lay.

Q. How does that dunnage that was used as a chock, that was under these bottom rolls, how do you say it lay?

A. At that particular moment?

Q. Yes, sir, at that particular moment.

A. Well, this way (indicating).

Q. What way?

A. Right here (indicating).

Q. You mean holding two rolls?

A. Yes, sir, and then there will be others over here (indicating).

Q. But there was one piece of dunnage holding both of these rolls?

A. Not one. The way you see it right now (indicating).

Mr. Behrens: What the witness has shown is that between the first and second tiers, holding them both, is one piece of wood like that (indicating) which operates so as to hold the forward part of the first tier and the after part of the second tier. He has also said that there was another piece of dunnage which related to the second and third tiers. It goes under the forward part of the second tier and the aft part of the third tier.

Now, have I actually described, Mr. Witness, in words, what you have said up here?

The Witness: Just may I ask one question?

Mr. Behrens: Yes, you may.

The Witness: You say this is the first tier (indicating)? [fol. 118] Mr. Behrens: Yes.

The Witness: Like you indicate, this is the first tier going against the midships.

Mr. Behrens: And this is the after tier, you say?

The Witness: Yes. I know this was the midships (indicating). Now, let us say this is the midship of the hatch (indicating).

Mr. Behrens: I don't know what you refer to by the words "amidship of the hatch." Do you mean the center line of the hatch running fore and aft? Do you mean the after hatch coaming?

The Witness: The after hatch coaming.

Mr. Behrens: This first tier is about the after hatch coaming?

The Witness: That is not the first tier. That is not what we call it.

Mr. Behrens: Would you rather call it the fourth tier?

The Witness: I would rather call it the second tier from the after end of the coaming.

Mr. Behrens: All right. In other words, what you would like to do, Mr. Witness, what I think you are trying to tell us is that the way these four have been set up, if we are to consider this (indicating) the after hatch coaming, then there would be another tier in here; right (indicating)?

The Witness: Yes, there would be another tier here (indicating).

Mr. Behrens: Is that accurately stated according to your recollection?

The Witness: That is right.

By Mr. Behrens:

Q. So that this is the after part of the square of the hatch (indicating), here is the other side, the inshore side (indicating), this is the forward part of the hatch (indicating), this is the offshore side?

A. Correct.

[fol. 119] Q. And you say that in order to make this example correct, you feel that this fifth tier should be put in?

A. That is right.

Q. All right. Now, we have five tiers. Are we going to put another piece of dunnage in there (indicating), holding these two together?

A. That is right, sir.

Q. Yes, I see. All right. Now, tell us, show us with the five tiers which roll it was you state came out and struck Mr. Palazzolo?

A. (Indicating) This is how it stood right there, just the way you see it, this is how this tier was out. We were working on this tier, Frank and Louis were working on this tier right here (indicating each of the tiers), and there were two or three tiers out in the square.

Q. You mean two or three rolls?

A. Yes, two or three rolls. I am sorry, two or three rolls.

Q. Yes.

A. They hooked up one roll, and they were watching it going up. As that roll went, was going up, the hatch boss came over and told the men down below——.

Q. That they were going to work to 10 o'clock?

A. Yes.

Q. And they said that they didn't want to because it was too hot?

A. That is right.

In the meantime, while they were doing that, the forward gang was working on a tier also, and as they were——

Q. They were working on that fifth tier?

A. Right here (indicating).

Q. Yes?

A. And as they were working on this tier here, this roll (indicating) came down with terrific force. At that time when this came down, it gave such a terrific bang that it disturbed this tier (indicating), and this roll out here (indicating) came out.

Q. This roll (indicating) came out?

A. This (indicating).

[fol. 120] Q. This is the one that came out (indicating), and that is the one that hit Palazzolo (indicating)?

A. Yes, sir.

Mr. Schwartz: Can we describe it for the record?

Mr. Behrens: What he has described is the bottom roll in the second tier from the after part of the hatch on the offshore side.

The Witness: Yes, the bottom roll in the second tier, yes.

Mr. Frank: And two tiers away from——

Mr. Behrens: Three tiers away from the one——

Mr. Frank: Three tiers away, yes.

Mr. Behrens: Three tiers away from the one that the forward gang was working on, but it was this bottom roll on the second tier on the after side.

The Witness: That is right.

Q. Wasn't there something to keep this roll from coming out? Wasn't there something in the way of dunnage, choking, to keep that roll from coming out of there?

A. I don't get that question.

Q. What?

A. I don't get you.

The Court: Will you repeat it, Mr. Karr?

(At this point the reporter read the last question.)

A. Well, as that piece of dunnage on the bottom of that, underneath that roll, holding that roll in place, well, at the time this roll came down it disturbed that whole front tier—I don't say all those rolls came out.

Q. They all came out?

A. Not all of them.

Q. You say you don't say all of them?

A. No, it just disturbed them.

[fol. 121] Q. But you say that the one next to the, the next one, the one that the other gang was working on, the one next to it, that didn't come out?

A. There was dunnage there. I don't know how thick it was but this dunnage was there. Now, when it came down, it disturbed that roll right there (indicating) which Frank Palazzolo was standing in front of.

Q. My question, sir, wasn't that.

Let us get back to 30 seconds before the accident. Now, first, wasn't there something under this bottom roll?

A. There was a piece——

Q. Just a minute. Wasn't there something under that bottom roll to keep it from rolling out, the bottom roll of the second tier, wasn't there something under it to hold it?

A. There was a piece of dunnage.

Q. A piece of dunnage?

A. Yes, sir.

Q. Now, you said that that piece of dunnage not only supported the foremost part of the second tier, but also the after part of the third tier; didn't you tell us that?

A. Yes, sir.

Q. Then to boil it down, are you telling us that this bottom roll in the second tier, jumped the dunnage, or whatever was there, and came out, and the other one, the third tier remained stationary?

A. Not stationary, no, sir.

Q. Did it jump the dunnage and come out?

A. No, it didn't jump the dunnage, no, sir.

Q. You say it jumped some dunnage?

A. This one (indicating).

Q. The one that hit him?

A. It did.

Q. It was the bottom roll and it jumped the dunnage?

A. Yes, sir.

Q. Did you ever sign a statement before as to what happened here?

A. Yes, sir.

Q. When was that? When did you sign the statement about what happened, what roll hit Palazzolo and how; when did you do that?

A. I couldn't remember.

[fol. 122] Q. Was it yesterday, last week?

A. About two years, something like that.

Q. About two years ago?

A. Somewhere around that, yes.

Mr. Behrens: I have subpoenaed the records of Ryan. Did you take a statement from this man?

Mr. Schwartz: This is it.

(Document handed to Mr. Behrens.)

Mr. Behrens: Thank you. May I have this marked for identification, your Honor?

The Court: Ask him if that is his signature, first.

Q. Do you see your signature on there, Mr. Marchese?

A. Yes.

The Court: All right, mark it for identification.

Mr. Behrens: Now I can offer it.

Do you see your signature on each page?

The Witness: Yes, sir.

Mr. Behrens: This statement is dated 7 20 49.

Mr. Schwartz: No. That is the date of the accident. At the bottom it states 3 17 51.

The Clerk: It is marked March 17, 1951.

Mr. Schwartz: That is right.

The Clerk: Defendants' Exhibit A for identification.

(Statement of Jerry Marchese referred to received, and marked Defendants' Exhibit A for identification, as of this date.)

Q. All right, let us go over this statement. It says, "I have been working for Ryan for almost five years."

Now, this statement was taken on March 17, 1951, at Pier No. 6; was that so?

A. Yes, sir.

[fol. 123] Q. And it says, "Foreman, date of accident, was Anthony Domico." Is that so?

A. Yes.

Q. "On July 20, 1949, at 4 P. M., there were four of us working starboard side of No. 3 lower hold discharging rolls of pulp (various weights)."

Is that so?

A. That is right, sir.

Q. "We had started to discharge lower hold about 1 P. M. and by 4 P. M. we had the square of the hatch cleared of cargo right down to the deck and were breaking down tiers in the wings (tiers about three or four rolls high)."

Now, is that so?

A. Just about, yes, sir.

Q. You really didn't have it clear to the deck, had you?

A. To the deck? Well, just for about two or three in the square of the hatch.

Q. Were you breaking down tiers in the wings? Did you break down any tiers in the wings?

A. Just that one right there (indicating).

Q. "Our gang had eight men in the hold and No. 3 forward gang had eight men in the hatch (Frank Sorba's gang)."

Is that right?

A. That is right.

Q. "We had placed two rolls in the square of the hatch for discharge. One fore and aft and one Burton."

Is that right?

A. Just about, yes, sir, just about that way.

Q. "Frank Palazzolo was standing between these rolls talking to the foreman Tony Domico who was on the main deck."

Is that so, is it so that just before this accident Palazzolo was standing between two rolls talking to the foreman on the main deck?

A. That is right.

Q. It says: "Further conversation had stopped and while he was still looking up the forward gang had discharged a roll which caused a roll on the second tier about five feet away from Palazzolo to drop down from the second tier [fol. 124] and seemed to graze the lower part of his face and body and landed on his left leg with Palazzolo under roll."

Is that what happened? That one of these other rolls up above was dislodged, knocked off, came down, and it grazed the side of his body and hurt his leg; is that what happened?

A. Well, the way you see it. The way you got these rolls piled up, they were all different sized rolls in length.

Mr. Schwartz: Now, I move to strike it out as not being responsive. I think we can get an answer on it.

I think we should have the last question read, your Honor.

The Court: Mr. Karr, will you read that last question, please?

(Question repeated by the reporter.)

The Witness: Yes, sir.

Q. That is what really happened?

A. Yes, sir.

Q. It wasn't this bottom roll that came out, that wasn't the roll that hit him——

Mr. Frank: Wait a minute. You didn't let him answer.

A. That roll did come out.

Q. You just got through telling us that this roll came out and hit Palazzolo. Now, that isn't so, is it; that just isn't so, is it?

A. No, the top roll hit him, according to my statement.

Q. Do you stand by your statement now? Do you stand by the statement or do you stand by the story you have just told this Court and jury?

A. I stand by the statement.

Q. It wasn't that roll that hit him (indicating)?

A. That is right.

[fol. 125] Q. It was some other roll?

A. It was the second roll up on top of this tier (indicating).

Q. That was knocked off, wasn't it? The second roll that was up on top, that was the one that was knocked off?

A. Yes, by the disturbance.

Q. What you are saying is that somebody else knocked one of these top ones off and that fell down and hit him?

A. That is right. That was hanging the side.

Q. What did the dunnage underneath here—whether it was chocks or dunnage or had steel hitts on it—what did that have to do with it? It had nothings to do with it; did it?

A. That roll didn't have nothing to do with it.

Q. It had nothing to do with the fact that there was

dunnage or chocks or anything else under it; that had nothing to do with it, did it?

A. No.

Q. Did it?

A. No.

Mr. Behrens: I have no further questions.

Mr. Frank: May I have the statement?

(At this point the exhibit was handed to Mr. Frank.)

The Court: Do you have anything, Mr. Schwartz?

Mr. Schwartz: I have nothing, sir. I assume Mr. Frank wants to read the statement.

Redirect examination.

By Mr. Frank:

Q. Did you remove all of those things—let me ask you this: Just before Mr. Behrens asked you about the front row, now, did the front row, did that remain or did that roll over?

A. That rolled over the dunnage.

Q. But what you say is from what you saw——

A. The top roll, that——

Q. The top roll. That was the one that hit him, and not the front roll?

A. I was confused at the time.

[fol. 126] Q. You were confused at what time? I don't understand you.

A. At the time I was explaining that whole situation.

Q. I want to get this cleared up once and for all.

Do I understand you—let me ask you this: Are all of these rolls, all of these pieces, are they all the same size?

A. No, sir.

Q. The way they are here (indicating), regular?

A. No.

Q. There are smaller pieces, smaller rolls?

A. Yes.

Q. Now, I don't want to get the entire thing, but I want you to tell the jury exactly what happened and which roll it was.

Q. Now, will you show us what happened to the front rolls as well as the top rolls after the forward gang did whatever you say they did?

A. May I have some of those smaller ones.

Q. I will give them all to you (handing witness some small round wooden pieces).

You fix it up.

(At this point the witness set up the blocks.)

A. Well, this is the way they were lined up at the time. I meant to tell Mr.—what is his name, Behrens?

Q. Mr. Behrens, yes.

A. Mr. Behrens that the rolls weren't all alike, they were all different sizes.

Mr. Behrens: They were all of the same diameter, isn't that the testimony?

Mr. Frank: The diameter, the height of them was the same, but the length——

The Witness: The length was different.

Q. All right, go ahead.

A. The forward gang was working this roll up here, let us say, the fourth over to the after end, and this roll was over a little a little, about a foot or a foot and a half over (indicating).

[fol. 127] Q. Over what, I don't know.

A. Over the bottom roll.

Q. You mean the way that you have it now?

A. The way it is now, over the bottom roll.

Q. Go ahead.

A. This was wedged with pieces of dunnage like Mr. Behrens has indicated, that is the after end to the forward end of the rolls, and as they were working this disturbance took place and it is just the way you see it right now (indicating), and as they were working here, as they started——

Q. Easing?

A. Easing this down, this roll on top came down with a terrific force, it disturbed that tier right here (indicating), and tipped this roll over this way (indicating).

Q. What happened to this one (indicating)?

A. As this came out here, it tipped over.

Q. Which one tipped over?

A. The one on the top, it came down, dancing over.

Q. Dancing?

A. I mean wobbling over this way (indicating). It came down and hit Frank.

Q. Did this remain secured (indicating) by dunnage or did it go over the dunnage, the front?

A. It went over the dunnage.

Q. So when you said that the dunnage had nothing to do with the chocking, what did you mean by that, did you mean that as long as this went over the dunnage—well, do you know why it caused it to fall?

A. It jumped, it rolled; it jumped the dunnage, I meant to say.

Q. You mean this one, the front gave way (indicating)?

A. Gave way and this came right down.

Q. And this sort of leaned over?

A. That is it.

Q. And that is the way you saw it?

A. Yes, coming down, dancing over to Frank and hit him.

Q. I understand.

Mr. Frank: That is all.

Mr. Behrens: I just have one further question.

[fol. 128] Recross-examination.

By Mr. Behrens:

Q. Looking at this statement; I want to read you this part and ask you if——

Mr. Frank: Why don't you put the entire statement in evidence?

Mr. Behrens: I will be very happy to do that.

Mr. Frank: Don't use part of it.

Mr. Behrens: I will do that.

The Court: You can't put it in, of course, you can use the part.

Mr. Behrens: Very well.

The Clerk: Defendants' Exhibit A for identification now in evidence.

(Statement received in evidence as Defendants' Exhibit A as of this date.)

The Court: All right.

By Mr. Behrens:

Q. Let me call your attention to this part of it which says:

"These rolls in wings were stowed fore and aft, locked and bound by bilge type of stowage which required no dunnage or planking."

Now, by the bilge type of stowage, you mean this chime method, as we call it; right; is that what you mean by the bilge type?

Mr. Frank: Let us hear that answer.

A. I don't call it a bilge; I never used that. I just used the tiering system.

Q. "* * * which required no dunnage or planking and lower rolls touching deck had little and insufficient chocking. However, this condition did not cause this accident * * *."

[fol. 129] Do you stand by that statement?

A. Do you mind repeating that once more?

Q. It says:

"* * * and lower rolls touching deck had little and insufficient chocking. However, this condition did not cause this accident * * *"

Mr. Frank: Just a moment, your Honor.

Isn't that a question as to the cause of the accident? Isn't that a question for the jury to decide instead of a man, a longshoreman, who is standing down there?

I object, your Honor.

The Court: As a matter of fact, if the statement wasn't present you might have a very good objection, but having let the statement go in without objection——

Mr. Frank: I wanted the statement in.

The Court: Well, it being a signed statement, and he having testified, well, I think he should have a chance to

explain perhaps any inconsistencies there may be, and I don't know that there are any inconsistencies.

Mr. Frank: May I make objection? It is my fault that I didn't state it.

Your Honor, as to what causes an accident, well, your Honor, that is always a question for the jury.

The Court: Yes, that is entirely a question for the jury.

Mr. Frank: That is the point.

Now, here he has given the explanation, and then there is a conclusion in the statement that the insufficient chocking had nothing to do with the accident. Your Honor, I say that is a question for the jury to determine, and not for him. [fol. 130] Mr. Behrens: I say this is cross examination of this witness who first described a roll that jumped over the chocking and then came out and struck the plaintiff, and now that has disappeared.

The Court: Well, Mr. Frank's objection is not based on anything of that kind. His objection is based on the fact that that is a conclusion by the witness, a conclusion which is properly for the jury to draw.

Mr. Behrens: I will withdraw the question, your Honor.

The Court: Yes, that is right.

Mr. Schwartz: Well, the fact of the matter is that the statement is in evidence, and I assume the jury is entitled to read it.

The Court: Oh, yes, they can read it.

Mr. Frank: I ask that it go in, let us all see it.

Mr. Behrens: It is already in evidence, Mr. Frank.

I just want to complete my cross examination of the witness.

By Mr. Behrens:

Q. It says here that:

"Palazzolo was struck"——

Well, the roll that Palazzolo was struck with "became dislodged by another roll."

Is that true?

A. Dislodged by another roll?

Q. That is what it says.

A. Can you tell me where that is? I don't see it.

Oh, it is right here, I see it now.

Yes. I can explain that.

Q. Will you, please?

A. Yes, sir. At the time we were breaking down the square, we took one roll from this tier here (indicating), [fol. 131] underneath the coaming, from the top, that is as we broke down the square, so that left it two high, two high, and as we went down the square we removed one roll from the fifth tier, as you call it, from the after coaming, so that it left it two high. Now, that left one roll, as we took it out from that fifth tier, one roll hanging over that tier, right on the bottom.

Q. What roll dislodged that tier, that roll that was hanging over; what roll dislodged it? Some roll in the forward part of the hatch as you were talking?

A. As the forward gang was working, they dislodged that roll, dislodged it by the bang.

Q. In other words, you are saying that one roll down here, four tiers away, was dislodged by some roll down here; that is what you meant in your statement?

A. Yes. Well, you see these tiers above here hadn't even rolled——

Q. Yes, and that brings up a subject: Is it not common and customary practice when you are breaking down cargo of this type to keep the tiers even, not to let some tiers high and some low?

A. Well, when we were breaking them down that way, how could we break them underneath the wing? As we were breaking down the square, we couldn't do that.

Q. I understood you to say that you had this one here (indicating) two high, and this one here you have got three high; isn't that so? Isn't that what you have been telling us (indicating)?

A. This whole front tier was two high in the front, two high in the front and the back was three high. That was two high, because when we broke down the square we took one roll off of this one (indicating).

Q. All the way across it is two high?

A. No.

Q. Just one high?

A. As we broke it down, just one.

[fol. 132] Q. You took one, and that was lower than the tier next to it?

A. Not next to it, in the wings.

Mr. Schwartz: Toward the skin?

The Witness: I mean toward the sweat boards, left it two high, so ten as we cleared out the square——

Mr. Behrens: Almost?

The Witness: Well, almost.

Mr. Behrens: Yes.

The Witness: With those two or three rolls out in the square, we cleaned out the last tier on the after end of the coaming, and there No. 3, the forward gang was working, and they dislodged their roll, dislodged that whole front tier two high, and that one roll that was hanging over——

Q. Why was it hanging over?

A. Well, the tier that we took next to it, it was underneath it——

Q. It wasn't even; it wasn't even, these two tiers were not even?

A. That is right, they were going to work on that there, that tier there, until the hatch box came over the hatch.

Q. Which brings me back again, isn't it customary and usual to keep the tiers at the same height so that you don't have stuff hanging over like that?

A. How are we going to break into that?

Q. I am not asking you how and why; I am asking you if that isn't the customary practice that you have always followed as a longshoreman, and that is to try and keep it level?

A. That is understood, but if that comes in crooked there, how can we keep it level

Q. The point is that you didn't keep it level.

A. That is true, yes.

Mr. Behrens: I have no further questions.

[fol. 133] Redirect examination.

By Mr. Frank:

Q. Let me first ask you about that statement: Whose language is this in; is this yours?

A. Not all of it, no, sir.

Q. Did you use the words "bilge type of stowage"?

A. No, sir.

Q. Did you ever hear the words "bilge type"?

A. No, sir.

Q. Who wrote it out; is that your handwriting?

A. No, sir, not mine.

Q. Let us see, how was that statement taken?

A. He asked questions and he wrote it down on paper.

Q. Where were you at the time when this was taken?

A. I don't remember where that was taken.

Q. It says March 17, 1951—March 17 is a famous day. Now, maybe you can remember where you were at that time.

A. Now I remember where this was taken at.

Q. Where?

A. It was taken at the timekeeper's office.

Q. At the timekeeper's office?

A. Yes, sir.

Q. I want to see whether some of that language is yours. You say as to bilge type, you never even heard of that?

A. I never used it; I never heard of it.

Q. Did you ever see ships come in that were not chocked in some manner, no matter how they were done?

A. What do you mean by that?

Q. Well, I will withdraw it.

Now, I want to ask you this: When you were still breaking down in the square of the hatch, what do you mean when you say you removed the one on top, was that with the winch?

A. Yes, with the winch.

Q. And in order to get it off the winch, where is it; is it way under the wings, or is it right at the edge?

A. Right at the edge of the coaming.

[fol. 134] Q. I want to make sure that the jury understands what you are getting at. In other words, while you can still get under there, on all of them you take off the top so that leaves them——

A. That is right.

Q. So that leaves them all two high?

A. If we can get as far as we could underneath——

Q. But you don't go to the one on top way in the back?

A. No, no.

Q. If you did that, what would happen to the cargo?

A. It would damage the rolls.

Q. You are not permitted to do that?

A. That is right.

Q. And you are permitted, and it is customary to take off the top one right under the wing, right at the coaming?

A. At the coaming, yes.

Q. Is that the idea?

A. That is right.

Q. And that left it two high?

A. That is right.

Q. Now, was it level at the two high?

A. In the square.

Q. In the square, around the square?

A. Right.

Q. Now, Mr. Behrens said that you are supposed to keep it level. Well, did you keep it level, except way back?

A. Yes, we did.

Q. Now, you said that left one overhanging, how much did that one overhang?

A. Well, enough——

Q. Well, how much was it in measurement?

A. About a foot or two.

Q. All right, was that a large roll?

A. Yes, sir.

Q. How much did it weigh, about?

A. About 3,200 pounds.

Q. That is the one that landed on him?

A. It hit Frank, yes, sir.

Q. Now, that roll, you say, overhung, and that was on the second tier?

A. The second tier.

Q. Is that the idea?

A. Yes.

[fol. 135] Q. When the forward gang broke down that tier, what happened to this bottom roll: what did that do?

A. That tier was disturbed, this bottom roll, it jumped the dunnage.

Q. It jumped, it got over the dunnage?

A. That is right, and this one came right over.

Q. Instead of falling straight down?

A. It kicked off.

Q. Show us how.

A. As this bottom one came rolling over the dunnage, this top one came over.

Q. Suppose you keep on rolling it, go ahead.

A. Well, as this one came rolling out, this one came toppling out and dancing (indicating).

Q. You mean, when you say "dancing," you mean wobbling?

A. Wobbling, and came down and hit Frank and he couldn't get away.

Q. You heard Louis Salvatore say it was the first one that hit him?

A. Yes, sir.

Q. You don't agree, you say it was——

A. The top, the second.

Q. The one from the second tier?

A. That is right.

Q. And it wobbled and finally hit him?

A. Yes, sir.

Q. Are you sure that this bottom one went over the dunnage?

A. Yes.

Q. And that is what caused this thing to fall over?

A. Yes.

Mr. Frank: That is all.

Recross-examination.

By Mr. Behrens:

Q. Do you mean, Mr. Witness, by your last answer, that this was caused to fall off because the other one moved out from underneath it?

A. No.

Q. Wasn't it the other way around; do you understand?

Mr. Frank: Do you understand the question?

[fol. 136] The Witness: No, I don't understand the question.

By Mr. Behrens:

Q. You have said that there was one hanging over?

A. Yes, sir.

Q. Now, you don't mean that was caused to come off because this moved out and let that drop down (indicating); that isn't what happened?

A. It did drop down this way; it came over that way (indicating); because this here was like this thing (indicating).

Mr. Frank: Let us see that, will you?

The Witness: In other words, the whole tier right across, each one was overlapping the other (indicating); and as the forward gang was working, they dislodged this roll and this whole tier was disturbed and——

Q. You have said that.

Mr. Frank: Let him finish.

A. As this was coming over, it jumped the dunnage, and this was coming out, and it went over this way and wobbled (indicating).

Q. You say it jumped the dunnage?

A. Yes, sir.

Q. And you say you signed a statement here saying that the dunnage had nothing to do with it——

Mr. Frank: I object to that; that is a conclusion.

The Court: We have ruled on that; we will let the jury decide.

Mr. Frank: It is for the jury to decide.
Mr. Behrens: I have no further questions.
Mr. Frank: All right.
Mr. Schwartz: I have a question now.

[fol. 137] By Mr. Schwartz:

Q. When you talked to anyone in connection with being a witness in this case, did you tell them at that time that you had signed a statement for Ryan?
A. All I know is when he came——
Q. That isn't my question.

Mr. Frank: Let him finish.
Mr. Schwartz: Haven't you finished?
The Witness: He said he was from the insurance company.
Mr. Schwartz: I move to strike it out as not being responsive at all.
Mr. Frank: I thought he asked him that. Would you read that question that he asked?
The Court: Would you read that question, Mr. Karr?

(At this point the reporter read the last question.)

By Mr. Schwartz:

Q. Yes or no.
A. No. I said I signed no statement, I told them——
Q. You mean when you were called to testify in this case on behalf of Mr. Palazzolo, in answer to any question that was put to you by Mr. Frank or anyone representing his office, you said you didn't sign a statement for Ryan?
A. No, I didn't sign a statement for Ryan at the time.
Q. Well, now, were you told that you might be confronted by a statement that you had signed for Ryan with respect to how this accident occurred, were you told that before you came here?

Mr. Frank: Told by whom? You see, it is very confusing.
[fol. 138] Mr. Schwartz: By Mr. Frank or someone in his office.

Mr. Frank: Why don't you say me?

A. Yes.

By Mr. Schwartz:

Q. You were told that you might be confronted with it?
A. Well, I had already told Mr. Frank.
Q. That you had signed a statement?
A. Signed a statement, yes.
Q. And were you told that in the event the statement was shown to you to stick by your statement?

Mr. Frank: Sir, I will—all right, that is pretty good, I don't know.

The Witness: What was that again?

Mr. Schwartz: Will you read it back, Mr. Stenographer?

(At this point the reporter read the last question.)

A. Yes.

Mr. Schwartz: That is all.

Mr. Frank: That is all. Wait a minute, let us get this straightened out. Maybe we are overdoing it.

Redirect examination.

By Mr. Frank:

Q. As a matter of fact, you were down in my office long ago, were you not?
A. Yes, sir.
Q. And you told me and asked me whether if the Ryan people came and asked you to make a statement, sign a statement, weren't you told to tell them the truth and to sign anything that they wanted; is that right?
A. Yes, sir.

[fol. 139] Mr. Behrens: How long ago was that, Mr. Witness?

The Witness: Well, I don't know exactly.

Mr. Schwartz: Was it before you signed this statement or after? Remember, this statement was signed on March 17, 1951, almost two years ago.

The Witness: Well, at that time I had seen Mr. Frank first.

Mr. Schwartz: You had seen Mr. Frank first?

The Witness: Yes, sir.

Mr. Schwartz: And he told you to sign a statement and tell the truth to whomever interviewed you; is that right?

The Witness: Yes, sir.

Mr. Schwartz: That is all.

Mr. Frank: That is all.

The Court: Is that all?

Mr. Frank: If your Honor pleases, how long are you going to sit?

The Court: Do you have any other witnesses out there?

Mr. Frank: Oh, sure, if you want me to put any more on, but it will take quite a time.

The Court: Well, will they lose a day's work?

Mr. Frank: That I can't help; that we can't help, we have to take them all away.

The Court: Then we will take a recess until tomorrow morning at 10:30.

(At 4:05 P. M. the court was recessed until Thursday morning, 10:30, February 5, 1953.)

[fol. 140] Trial continued.

JOHN KRAYNOCK, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Frank:

Q. Mr. Kraynock, you are a longshoreman?

A. That is correct.

Q. And have been for how many years?

A. Oh, it will be ever so many years, 1946.

Q. What did you do before that?

A. Worked in the Navy Yard.

Q. Ever since you became a longshoreman, Mr. Kraynock, have you been working on Pier 6?

A. That is right.

Q. And for Ryan Stevedoring Company?

A. Yes.

Q. On this particular vessel who was your partner?

A. Jerry Marchese.

Q. That is the witness who was here yesterday?

A. Yes.

Q. I show you a paper here—after you started to go down in the lower hold, I mean after you got through with the lower 'tween deck you started as I understand to clear the square of the hatch?

A. That is right.

Q. In clearing the square of the hatch how do you do that?

A. What do you mean by that?

Q. I mean by that, is the winch used all the time in taking them out?

A. That is right, that is right.

Q. Do you keep it level as far as you can?

A. You have got to.

[fol. 141] Q. When you get to the part of the pile that is directly even or directly under the coaming, this is the coaming, the part that I am pointing to here (referring to model), what do you do?

A. Take the pulp out.

Q. You take what out?

A. The pulp.

Q. Take how many rolls out?

A. One.

Q. One roll?

A. That is right.

Q. After you remove the roll, how many would that leave on the pile?

A. Two rolls.

Q. That is for the purpose of leveling off?

A. That is right.

Q. And the people on the inshore side——

A. Do the same thing.

Q. They do the same thing?

A. Yes, to keep it all level.

Q. Do you also, when you take off one under the coaming, do you go underneath the wings?

A. We can't do that.

Q. After taking one off to level, do you go underneath to take the others off?

A. No, we can't do that.

Q. Why?

A. It is too high to put your hook in there (indicating); you can't put your hook in, the hook would catch on the coaming.

Q. And anything could happen?

A. That is right, the hook could swing right out and hit somebody.

Q. How about the cargo, what would happen to the cargo that way; would there be any damage?

A. Sure, you got to damage it, and you can't do it that way in the first place.

Q. At some time or other you got to a position where you had cleared the square of the hatch with the exception of some rolls; is that right?

A. Yes, that is right.

Q. We do not want to go through the entire thing again. About how many rolls were left in the square?

A. Two rolls. They were at a sort of angle.

Q. What?

A. They were at a sort of angle.

[fol. 142] Q. I understand. The two rolls that were left, were they small or large?

A. They were about 28; 2900 pounds.

Q. They come as much as that?

A. They come as far as 3200 pounds too.

Mr. Frank Do you hear him all right?

A Juror: Not very good.

Q. Keep your voice up a little more, will you?

A. All right.

Q. Now, at the time that this accident occurred, or shortly before, I am talking about the first few seconds before the accident happened, what were you doing?

A. I was down towards the ladder.

Q. Is that the after ladder?

A. That is about the safest place to stand.

Q. Why did you stand there?

A. Because the pulp won't come towards there; when you

hook up, you see when two men hook up, you see the other two we watch them.

Q. You watch them?

A. Yes, when they put the hooks on, we watch it go up, and they watch.

Q. You have got to look up?

A. We have got to look up.

Q. After they hooked up, did it start to go up?

A. Yes, it started.

Q. Then what did you see happen?

A. Then I seen that roll coming out.

Q. Where did it come from?

A. Well, there were two, you see. The square is all cleaned out, but there were two high, and the other gang was working over there.

Q. The other gang?

A. The other gang was working over there with pinch bars.

Q. The forward gang you mean?

A. Yes, the forward gang was working over there. So we seen this roll starting to come away, and we hollered. It was just like shifting gears, you see, when you see two gears [fol. 143] are separated, and that is the way it started to go down, and this one started to go, and that pushed this one down, it pushed it out.

Q. When you said that this other roll was pushed out——

A. It was pushed out, and went spinning.

Q. Was there anything underneath it?

A. Yes, just a scrap of wood.

Q. Let me finish. Was there anything underneath that roll to hold it from pushing out?

A. Nothing. Just a scrap of wood. In other words, toothpicks as far as I am concerned, that is all they used there.

Mr. Behrens: I do not hear him.

Mr. Frank: I do not hear either. Will you repeat that?

(Last answer repeated.)

The Witness: It was nothing but firewood.

Q. Tell me this: Which roll hit Palazzolo?

A. The first roll.

Q. You heard Jerry, your partner, testify?

A. I disagree with him.

Q. It was the first roll?

A. The first roll, because this roll as I say come out like a gear, one roll comes in this way and they separate, and that roll was spinning, and it goes way over there, and it pushed this one right out.

Q. Did you see that roll jump over——

A. No, sir.

Q. And dance, or whatever he said?

A. No, sir. All I seen was like shifting gears, that roll coming right out.

Q. Did you holler?

A. I hollered, Louis hollered and Jerry hollered, but it was too late.

The Court: You were only about how far away from it?

The Witness: From that roll I was about seven or eight feet.

[fol. 144] The Court: You could see exactly what happened?

The Witness: I could see everything what happened, because I am right at the ladder, just in from the ladder, and I could see everything what was happening, because two men stand aside while the other two are hooking up, that is the way it is done.

The Court: And it was the lower roll that pushed out?

The Witness: The first roll, and then the second roll was kind of like gears, as I said, and that bottom roll come out.

The Court: One went one way and the other went the other way?

The Witness: Once they start rolling you can't stop them.

The Court: You say there was some dunnage there?

The Witness: Scrap wood. In other words, like firewood.

The Court: Was there a wedge there or anything like that?

The Witness: No wedge. They didn't even use wedges at that time, they don't believe in wedges.

Mr. Frank: I think that is all.

Cross-examination.

By Mr. Behrens:

Q. At the time when you say these two rolls were spinning in opposite directions——

A. That is right.

Q. Where was the roll that had been hooked up by Palazzolo and his partner?

A. The roll that he hooked was in the square, they had three rolls. The roll that he hooked up went up.

Q. Had it already gone up before these two rolls started spinning?

A. These rolls weren't spinning yet.

Q. But what I am interested in finding out, Mr. Witness——

A. That is right.

[fol. 145] Q. You and I assume your partner were standing back by the ladder, is that right?

A. Yes.

Q. Practically under the wings; right?

A. We wasn't quite underneath the wing.

Q. You were in the square of the hatch?

A. That is right.

Q. Forward of the ladder?

A. That is right, by the ladder.

Q. As you stood there and you saw Palazzolo and his partner hook up the roll of pulp; you say that, is that correct?

A. That is correct.

Q. At the time that they hooked it up there wasn't any spinning going on behind you there or around you; is that right?

A. That is right.

Q. Now, did the winch start to take that roll of paper up?

A. That is right. That was going up already; that is pretty near over.

Q. That was up around the main deck?

A. I would say about the 'tween deck.

Q. The lower 'tween deck or the upper 'tween deck?

A. When that roll came out, it was about the 'tween deck.

There is the shelter deck of the vessel, and then you come to the 'tween deck.

Q. You call the first deck up from the bottom the shelter deck?

A. That is right, and then you have got the 'tween deck.

Q. That is as you go above from the hold?

A. Yes, that is right.

Q. You say that roll had been taken up into the 'tween deck on its way out of the ship?

A. It was about the 'tween deck.

Q. About there?

A. That is right.

Q. At that time you saw these two rolls spinning in opposite directions; is that right?

A. That is right.

Q. And where was Mr. Palazzolo and his partner standing as this was going up into the 'tween deck and on out [fol. 146] of the ship?

A. Palazzolo was, his back was toward No. 3 forward. Louis was toward No. 3 after end when this happened.

Q. And Palazzolo, his back was toward the forward part?

A. That is where the pulp came from.

Q. What were they doing after the roll started going away?

A. They watch it always until it gets over the coaming. With pulp you have got to watch it until it gets over the coaming, and then we come out to the square.

Q. They were watching this pulp as it was going up at the 'tween deck?

A. Until the time——

Q. I am not asking you that question. I am asking you what they were doing at that time.

A. They were watching the pulp go up.

Q. That is my question. They were standing there watching the pulp go up?

A. That is right.

Mr. Behrens: That is all.

Mr. Schwartz: No questions.

(Witness excused.)

FRANK PALAZZOLO, the plaintiff, called as a witness in his own behalf, having been first duly sworn, testified as follows:

The Court: Do you think you can go ahead a little ways without an interpreter, until he gets here?

Mr. Frank: I am going to try, your Honor.

Direct examination.

By Mr. Frank:

Q. Mr. Palazzolo, if you do not understand me tell me, and I will repeat the question. An interpreter will be here soon, but we will try to get along as much as we can. Do you understand that?

A. Yes.

[fol. 147] Q. How old a man are you?

A. Now?

Q. Now.

A. 61.

Q. When were you 61?

A. November, last year.

Q. Last year?

A. The 1st of November.

Q. You are a citizen of the United States?

A. Yes.

Q. And how many years have you been a citizen?

A. 21—1931, I get my citizenship papers.

Q. Did you say 31 or 21 years?

A. 21 years a citizen.

(Answer repeated: "21—1931, I get my citizenship papers.")

Q. How many years have you been a longshoreman?

A. It will be 22, 23, 24, like that something.

Q. Are you married?

A. Yes.

Q. You have one child I understand?

A. Yes.

Mr. Behrens: I object to that as irrelevant and immaterial.

The Court: What has that to do with it?

Mr. Frank: O. K.

Q. You work on the docks. Is that only over on Pier 6, or all over?

A. Before I worked all the time down in the hold.

Q. No. You didn't understand me. I said did you always work for Ryan Stevedoring, or for a lot of other companies too?

A. I work for other companies before.

Q. Before?

A. Before.

Q. How many years did you work for Ryan?

A. When he started in 1936, I think before I work for Jarka.

Q. Jarka used to have that pier?

A. Yes.

Q. Then Ryan took it over?

A. Yes.

Q. What year was that?

A. I think in 1946.

Q. In your work as a longshoreman where did you always work; what part of the ship did you always work in?

A. I do not understand.

[fol. 148] Q. I do not want to lead him, but there probably isn't any objection to this. Were you always down below, a hold man?

A. Yes.

Q. You have had a lot of experience?

A. Oh, yes, yes.

Q. Since Waterman or Ryan took over that pier did you help to unload this pulp, the rolls of pulp?

A. I do not understand.

Q. All right, let us try it a different way. After you went to work at Pier 6, did you have a lot to do with pulp?

A. Some time not that pier.

Q. I am talking about at this pier?

A. This pier? I do not know what it is. I do not understand.

Q. Tell me this: You work mainly with Italian longshoremen?

A. Yes.

Q. You understand English around the ship, don't you?
A. Yes.

Mr. Frank: Shall we suspend until the interpreter arrives?

The Court: I am going to suspend for five minutes until the interpreter gets here. You stay right there; the jury may step out: In five minutes we will send for you.

(Short recess.)

(JOSEPH NEGRI was duly sworn as interpreter, and interpreted as follows):

By Mr. Frank:

Q. I think in order to orient even the interpreter I want to get back a little, even by way of repetition. When you went to work for Ryan at Pier 6 did you help to unload pulp from time to time?

A. Before this ship or after?

[fol. 149] Q. Before?

A. The paper ships used to come in and we unloaded them.

Q. About how often would the paper ships come in?

A. Once a week.

Q. Let us take the year 1947, did you work exclusively for Ryan or did you also work on other ships for other companies?

A. When there was no ship for Ryan we went to other piers to work a day or two.

Q. Is that the custom in the harbor and on the docks?

A. That is the usual way.

Mr. Frank: I do not know whether we want to clutter up the record. I have exhibited these tax withholding statements to my opponents, and for the year 1947, the sum was $4,062.14; that includes, I want to tell you that, a payment of $66 from the New York Shipping Association, Central Records Bureau, which is by way of a vacation bonus, of $66.

Mr. Behrens: That also includes $3,913 paid to this man by Ryan.

Mr. Frank: That is correct. And from a few other companies.

The Court: All right.

Mr. Frank: In 1948, if your Honor please, the withholding statements show that he earned from Ryan Stevedoring Company, the sum of $3,366.76, and received from the New York Shipping Association, Central Records Bureau, the sum of $70, making a total of $3,436.76.

And from January 1, 1949, to the date of this accident, July 20, 1949, his earnings from Ryan amounted to $2,017.47 plus a vacation allowance by the New York Shipping Association, Central Records Bureau, of $75.20; making a total for that period of time up to the accident of $2,092.67.

[fol. 150] Mr. Behrens: Your Honor, it seems there may be some question about these figures. Mr. Schwartz and I would like to reserve our rights to question them later on if they prove to be inaccurate.

Mr. Frank: If there is any question I can offer these in evidence.

Mr. Schwartz: There is no question about what they purport to show.

Mr. Frank: I am in other words, relying on the withholding statements.

The Court: Oh, you can fix that up.

Mr. Frank: If there is any question we can agree, your Honor.

Q. I want to come down now to the day of the accident. When you reported to work that morning were you in good health?

A. Before the accident I was very able.

Q. Were you working steadily whenever there was work?

A. Yes.

Q. You shaped in at 8 o'clock, is that right?

A. 8 A. M., sir.

Q. And your partner was Louis Salvatore?

A. Louis Salvatore.

Q. Now, we have already established the work, and I do not want to go over the entire thing. I just want to come right down to the accident. At the time of the accident or a second or ten seconds before what work had you actually done; what were you doing, you yourself and Louis?

A. We were hooking on rolls.

Q. And before the accident happened had you hooked on a roll?

A. Yes, we had. We were working in the square of the hatch.

Q. How many rolls were there left in the square of the hatch?

A. About two or three.

Q. And the one you hooked on, did it go up?

A. As soon as we hook them they lifted them.

[fol. 151] Q. Who signaled to the winchman to go up, you or Louis?

A. I don't know.

Q. After it went up did you hear anything?

A. My partners were yelling; before I could move the roll hit me.

Q. How were you standing at the time you were hit?

A. I was hooking and watching upwards to the deck man.

Q. After you hooked what happened to that draft that you hooked on to?

A. The rolls from behind me, they became unloosened.

Q. That isn't what I asked you. I want to ask you this: You say that you hooked on now. Now, did this roll that you hooked on, did that start to go up?

A. Yes.

Q. Have you any idea how high it had gone up at the time when you were struck by another roll?

A. No.

Q. What part of you was struck by the roll?

A. When the roll came down it rolled on my foot, and I went down and it rolled over me.

Q. Did the roll hit your face?

A. No, sir.

Q. Did you have any mark at all on your face?

A. No.

Q. After the roll landed on you did you remain conscious, did you know what was going on?

A. I was semi-dazed.

Q. Then what happened?

A. I started yelling because I was under the roll.

Q. How was the roll removed?

A. They hooked it onto the fall and picked it up.

Q. How were you taken out of the hold?

A. Two men picked me up, and they put me on a platform.

Q. And the platform was raised up?

A. They lifted it to the deck.

Q. At the time when you were placed on the platform were you conscious, did you know what was going on?

A. I did understand a little. I could see it.

[fol. 1524] Q. When you got up on deck do you remember somebody giving you a needle, sticking a needle into you?

A. Yes.

Q. As you were going up on the platform how did you feel?

A. Always dazed, but I could understand.

Q. Then when you got up on the pier did a doctor come over and see you?

A. The doctor was there already.

Q. And then did an ambulance take you to the Norwegian Hospital?

A. The ambulance came and took me to the Norwegian Hospital.

Q. In order to get the dates correctly—these will be offered in evidence when the doctor gets here, but I will use these in this question. You were in the Norwegian Hospital from July 20, 1949, to March 9, 1950; in other words, about seven and a half months, is that right?

A. Yes, 1950.

Q. How many operations were performed on your leg in the Norwegian Hospital?

A. Two.

The Court: What leg was it?

The Witness: The left.

Q. Do you remember whether these operations were under a general or under a local anesthetic?

A. When they took me to the operating room I was not conscious.

Q. At the first operation?

A. Yes.

Q. How about the second operation?

A. They give me a mask.

Q. I understand. While you were in the Norwegian Hospital how did you feel?

A. For two or three days I could understand people, see people around me but I couldn't see.

Q. Were you in bed all the time for the seven and a half months that you were in the Norwegian Hospital?

A. They put me in a wheel chair on Christmas day.

Q. 1949, that must be?

A. 1949, yes. For Christmas day 1949 they took me out in a wheel chair for an hour or an hour [fol. 153] and a half, and then I went to bed and never come out of bed since.

Q. Where did you have pain while you were in the Norwegian Hospital; let us talk about that now?

A. In my knee, pointing to the left knee.

Q. The first operation that you had was on what part of your leg, do you remember?

The Interpreter: He points from the knee upwards to the thigh.

Q. And the second operation was where?

A. In the Norwegian Hospital?

Q. We are talking about the Norwegian Hospital only.

A. Around the calf; they make two holes, one pointing to the calf and one here pointing to the ankle; there was infection in it.

Q. While you were in the Norwegian Hospital an infection set in in part of your leg?

A. After 15 or 30 days that I was in the Norwegian Hospital the infection set about.

Q. Tell me this: Originally in the Norwegian Hospital after the operations were you put in a cast?

A. Originally?

Q. In the Norwegian Hospital after the operation were you put in a cast?

The Interpreter: He is pointing from below the chest now.

Q. Down where?

A. My right leg was cast up to the knee, and the other one all the way down to the ankle.

Q. Was there anything connecting the two casts?

A. There was two sticks under there to hold fast.

Q. How many casts did you have in the Norwegian Hospital only?

A. Three.

Q. When you went out of the Norwegian Hospital where were you taken to?

A. To St. Vincent's, New York.

[fol. 154] Q. And you entered St. Vincent's on the same day that you left, which was March 9, 1950?

A. Yes.

Q. And you remained in St. Vincent's to August 4, 1950?

A. That is correct.

Q. When you entered St. Vincent's Hospital did you have any cast on?

A. The cast was like a boot; it went from the bottom of the shoe up, up to the thigh, way up to the thigh.

Q. Was the cast on you only on the under part of the leg, or was it all around the leg?

A. Only underneath, and then up on top there was gauze.

Q. That is for the infection I take it?

A. The infection is one thing, and the other was only to hold it fast.

Q. Tell me this: At the time that you entered St. Vincent's Hospital did you have any feeling in this leg at all?

A. I had sensation in my thigh, but not below the thigh.

Q. In St. Vincent's Hospital were you in bed all the time or only part of the time?

A. Until the infection left me I was in bed all the time.

Q. What did they do for you in St. Vincent's Hospital?

A. They put a silver tube in from where that hole is, pointing to the side of the calf, almost down to the ankle, because it is almost empty in there.

Q. You mean there was an opening through there?

A. That is what he means. Then they put up a bottle, and they were putting it in intravenously, into the leg.

Q. Some solution?

A. Some solution, eight drops to a minute for 24 hours.

Q. How long a time did the treatment last whereby they used that silver tube in your leg; how long did that continue about?

A. 24 hours.

Q. Then did they take the tube out?

A. Yes.

Q. And what did they do to help clear up the infection after they removed the tube?

A. Every day they come in and clean it. They used the [fol. 155] same water (Interpreter: He calls it water) that came from a bottle, with a syringe. They put it into a bottle, and they used that, and filled up that opening with a syringe. After it was full then they put some kind of blue around it all around, and then they put on cellophane paper on top, and what they used to call it, glass paper, glassine paper, not to let the medicine come out.

Q. Your stay in St. Vincent's Hospital was approximately five months. How long before you left St. Vincent's Hospital were you permitted out of bed?

A. I beg pardon?

Q. After your stay in St. Vincent's Hospital, which was five months, how long before that were you permitted out of bed?

A. After three months.

Q. Now, after that, when you got out of bed, were you permitted to walk?

A. With the wheel chair I went around.

Q. And how long were you in a wheel chair?

A. Until they sent me home.

Q. And when they sent you home how did you get around?

A. The same day that I went home they gave me crutches.

Q. And are those the crutches that you have now (indicating)?

A. Yes, sir.

Q. Have you ever been without those crutches, in getting around?

A. No, sir, I cannot.

Q. Now, you were let out of St. Vincent's Hospital on August 4, 1950, is that right?

A. Yes, sir.

Q. And then you went home?

A. Yes.

Q. And the next time that you went into any other hospital was on September 21, 1950, when you were admitted to the Long Island College Hospital?

A. Yes, sir.

Q. What did you do at home during that period of time? Did you get any medical attention during that month or a little more than a month that you were home?

A. They did not do nothing because my infection was over.

[fol. 156] Q. And you stayed at home?

A. That is right.

Q. Did you see any doctor before you were admitted to the Long Island College Hospital, and I speak of the first admission?

A. Two doctors came, one was Dr. Mahoney from St. Vincent's, and the other was Dr. Fett.

Q. Dr. Fett saw you at home?

A. Yes.

Q. And it was the Dr. Fett that saw you at home who was the doctor who had you admitted to Long Island College Hospital?

A. No, sir, it was Mahoney.

Q. Well, after you were admitted to the Long Island College Hospital was Dr. Fett taking care of you, along with other doctors, was he one of those doctors that was taking care of you?

A. No, it was Dr. Peppe.

Q. Dr. Peppe was in the Norwegian Hospital, wasn't he?

A. Yes.

Q. Well, I did not ask you about the Norwegian Hospital——

A. It was Dr. Fett, yes.

Q. And up to the present time have you been taken care of by Dr. Fett?

A. Dr. Fett.

Q. And at the Long Island College Hospital how many operations did you have there?

A. Two.

Q. Your first admission to Long Island College Hospital was on September 21, 1950, is that right, sir?

A. Yes.

Q. And you were let out on November 24, 1950?

A. That is correct.

Q. Did Dr. Fett operate on you at Long Island College Hospital the first time?

A. Yes, sir.

Q. That operation, according to the hospital records, was on September 28, 1950.

Is that correct?

A. Yes, it was after six or seven days that I was in there.

Q. The day before the operation were you given a blood transfusion?

A. At Norwegian Hospital but not at Long Island College Hospital.

Q. You did get some blood transfusions in Norwegian Hospital?

A. I got two at the Norwegian Hospital.

[fol. 157] Q. Now, will you listen carefully to my question?

A. Yes, sir.

Q. I think the records here are correct and they will be offered in evidence later, but isn't it a fact that on September 27th, the day before Dr. Fett operated on you in Long Island College Hospital, that you were given a blood transfusion?

A. No.

Q. When you got into the Long Island College Hospital, in September, did you have any plates screwed together in your leg?

A. In here, yes (indicating left thigh).

Q. And at what hospital had they been inserted?

A. That was the Norwegian Hospital.

Q. Do you know whether that plate screwed together in your leg, do you know whether that was done shortly after the accident?

A. The same night I was operated on they put the plate in.

Q. Was that the same night as the day of the accident?

A. The same night, yes, sir.

Q. Now, this operation that Dr. Fett performed the first time, at Long Island College Hospital on September 28th, was that an operation for

A. They had to graft some bones. They took out the plate and

Q. Well, that is what I am getting at. You say that they removed the plate?

A. Yes, I have it right here in my pocket.

Q. Well, all right, we don't want to see it.

Now, you remained the first time in Long Island College Hospital, and I read now from the records of the hospital, from September 21, 1950, until November 24, 1950, approximately two months?

A. Yes.

Q. And then there were the following admissions ——

Mr. Frank: I will read these, from the records, your Honor, rather than put it in a long question to the witness.

The Court: Yes.

[fol. 158] Mr. Frank: There were the following admissions thereafter:

> March 1, 1950, where he remained until March 4, 1951, a period of four days.
>
> From April 4, 1951, to April 6, 1951, two days.
>
> July 2, 1951, to July 4, 1951, and from September 28, 1951 to October 3, 1951.

Q. Are they correct dates, sir?

A. Yes, I think so.

Q. Now, the sixth time that you were admitted to Long Island College Hospital was on November 16, 1952, is that correct?

A. That is the last time that I was there. They operated on me.

Q. And you were discharged on December 3, 1951?

A. Yes.

Q. In between the time that you were in the hospital and went out of the hospital did you see Dr. Fett at his office?

A. In between these times I went in and out of the hospital I did not go to Dr. Fett's office, but he always told me to report in two or three months to take an X-ray, in order to remove my plate.

Q. The last time that you were in the hospital there was another bone-graft, was there not?

A. Yes.

Q. Those other times that I mentioned to before, about

five or six times when you were in for short periods, was that for the purpose of changing casts?

A. They would take off the cast and they would see the condition of my leg.

They used to make X-rays then and then they would make more casts accordingly.

Q. Are you wearing a cast now?

A. Yes, sir.

Q. From where to where does that cast extend?

A. It is right here from the hip to the ankle (indicating).

Q. Was it Dr. Fett who operated on you the last time?

A. Yes, sir.

Q. Have you seen Dr. Fett since the operation?

[fol. 159] A. The last time I was at Dr. Fett's was the 23rd of January.

Q. Of this year?

A. 1953, yes.

Q. And when did he tell you to report again?

A. The 6th of March of this year.

Q. Do you know whether the cast is going to be taken off at that time?

A. No, I don't know.

Q. How do you feel now?

A. Well, I feel pains around my knee (indicating left knee).

Q. Is it better or worse when the cast is off or on?

A. When the cast is on it is better because when the cast is off I do not feel my leg—I don't even know that I have it.

Q. Have you any feeling below the point that you indicated before, namely, your thigh?

A. At the bottom of my leg I have a little feeling, but not the top—I cannot feel nothing there at all.

Q. You feel pain in the knee but the rest of the leg you have no feeling in at all, is that what you mean?

A. The bottom of my leg, at the left side, if you pinch it I can feel it, but not at the top.

Mr. Frank: Now, your Honor, with the consent of my two opponents I think I can say it has been stipulated that the amount of $9,857.36 is a fair, reasonable amount for the

hospitals and doctor bills that this plaintiff has incurred up to the present time.

Mr. Behrens: As I told your Honor at the pretrial conference on Tuesday last, on behalf of my client I would admit the reasonableness of the amount named by Mr. Frank, but I repeat my objection to the relevancy and materiality on the ground which I stated at the time under the provision of Title 33, Section 907, subdivision (d) of the United States Code.

[fol. 160] The Court: And I said that I would overrule that objection and give you an exception.

Mr. Behrens: Thank you, sir.

Mr. Frank: I have no further questions of this witness.

The Court: Is there any cross examination?

Mr. Behrens: I have just a few questions, your Honor.

The Court: Very well.

Cross examination:

By Mr. Behrens:

Q. At the time that you were struck by this roll of paper is it not the fact that you had your hands on the hooks that you had put in the other roll?

A. You have to hold onto those hooks until the fall is in force.

Q. You did have your hands on the hook because the fall was not in force?

A. It was just going into force and they were lifting the draft.

Q. At the time when you were struck by the roll is it not the fact that you looked up to see if the fall was going to go in force?

A. I was holding onto the hook and I knew that he was taking them up on the falls.

Q. Weren't you waiting for the Workman to pull it up——

Mr. Frank: At what time?

Q. At the time that you were injured?

A. He gives us the time to hook them and then he pulls them up.

Q. Well, at the time that you were struck by this roll of paper at that very instant——

A. He was picking it up when I got hurt.

Q. At that instant of time did you have your hand on the hook?

A. No, I did not. I was watching the draft.

Q. Do you remember being in my office in November of 1951?

A. Yes, sir.

[fol. 161] Q. And do you remember a lady named Rose Losito, an official interpreter from the Kings County Court being there; do you remember that?

A. There was a lady there but I don't know her name.

Q. Did she act as an interpreter?

A. Yes, sir.

Q. And the questions that I have put to you in English were interpreted to you by her in Italian?

A. Yes, sir, but she did not understand not even Italian. She does not understand the words that we do.

Q. Well, do you recall this question——

Mr. Frank: What page, please?

Mr. Behrens: I am reading now from page 13 of the deposition.

Q. Do you recall this question being put to you which was interpreted to you in Italian:

"Q. Tell me how you say you were injured?" Do you remember that?

A. Yes, and I told her how I got hurt.

Q. Well, do you remember saying to her at that time:

"Myself and my partner we just hooked the roll of paper to the hooks and we did not let go of the hooks while waiting for the winchman to pull it up so that we were holding onto the hooks and waiting for the man to pull it and all at once I felt something give and all I knew I was on the floor with a roll of paper on top of me."

Now, perhaps I had better break that answer down for you.

"Myself and my partner, we just had hooked the roll of paper and we did not let go of the hook while waiting for the winchman to pull it up—so we were holding onto the hooks and waiting for the man to pull it down and all at once I felt something give and all I knew I was on the floor with the roll of paper on top of me."

[fol. 162] Do you remember that?

A. Nothing gives. I know that I was hurt and I was under the roll. Nothing gave.

Q. I would like to devote your attention to that part of your answer that you just then gave which said:

"We did not let go of the hooks while waiting for the winchman to pull it up we were holding onto the hooks."

Did you say that then?

A. The fall was in force.

Q. No. My question is whether you recall giving the answer that I just read to you.

A. What is the question?

(Question repeated.)

A. I did not tell her that the draft was in force or was not in force—I did not tell her that the draft was not in force.

Mr. Frank: I will admit that you are reading correctly from the record of the deposition, Mr. Behrens.

Mr. Behrens: Thank you.

Q. Now, do you remember this question being asked of you and your making this answer through the Interpreter as follows:

"Q. Where were you standing while you were holding the hooks? A. I was in the square of the hatch and

back of me there were other rolls of paper and I was holding onto the hook."

Do you remember that?

A. Yes.

Q. And do you remember this?

"And looking up to see whether the man was going to pull."

A. Yes.

Q. And then do you remember this:

"And then I heard the crash."

[fol. 163] A. Then I heard the noise and my partner was yelling and the first thing I knew I was under the roll.

Q. Well, let me read the answer that you gave at that time:

"Upon hearing the crash I just turned to find out where the crash was going and I found myself with a roll of paper on top of me."

Do you remember making that answer?

A. I knew I had a roll of paper on top of me.

Q. Do you remember this question being asked of you:

"Q. As you were holding there, as you were holding the hook in which direction were you facing?

"A. I was facing north but looking upward."

Do you remember that?

A. I was offshore and I was watching north because the draft was going to the side of the dock, inshore.

Q. And how about this:

"Q. Was the roll of paper which you hooked in the after part of the hatch or was it in the wings near the square of the hatch or on the side of the hatch?

"A. It was in the square of the hatch."

Do you remember that?

A. The one we were hooking on was in the square of the hatch but the one that hit us was in the wing side.

Mr. Behrens: I should like the record to indicate that the original deposition was signed and sworn to by this witness on January 14, 1952; and then returned to me by Mr. Frank's office.

The Court: It is so understood.

Mr. Behrens: That is all.

(Witness excused.)

[fol. 164] HARALD ANDERSEN, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Frank:

Q. Mr. Andersen, will you be good enough to keep your voice raised so that all of the folks here can hear you?

A. Yes, sir, I will try.

Q. How old a man are you?

A. 73.

Q. I always hate to ask embarrassing questions.

A. That is all right.

Q. What is your position now?

A. I am a retired shipmaster.

Q. Shipmaster. That means that you had a master's license?

A. Yes.

Q. Do you still have it?

A. Yes, sir.

Q. For how many years have you held a master's license?

A. Since 1906. It is 47 years.

Q. How old were you when you started to sail?

A. 14.

Q. And was it in this country or in Denmark?

A. I started in Denmark.

Q. How long have you been sailing in this country?

A. Since 1919.

Q. Will you mention some of the companies that you worked for as a master?

A. Yes. United States Lines, the South Atlantic Steamship Lines, Waterman Steamship Company, Orion Shipping & Trading Corporation, the South Atlantic Steamship Line—

Q. How long have you been retired, Captain? I mean, when you said you retired. I know that you came back once?

A. Yes.

Q. Well, how long have you been retired?

A. Well, I retired in October, year before last, but I have been to sea since then.

Q. With whom?

A. The Orion Shipping & Trading Corporation.

[fol. 165] Q. That is a very large steamship company?

A. One of the largest in the United States.

Q. Now, you mentioned something about working for the Waterman Steamship Company?

A. Yes.

Q. What years did you work for Waterman?

A. Seven years. From December, 1941, after the outbreak of the world war, until December of 1948—seven years exactly.

Q. Continuously?

A. No. I was torpedoed in 1942 and I was two years and a half in a German prison camp, and then I came back before the war was finished, and I went on a new ship.

Q. What ship was that? With Waterman Steamship Company?

A. Yes.

Q. And you stayed with Waterman until when?

A. Until December of 1948.

Q. In connection with your work as master for all these years did you have occasion from time to time to have pulp cargo on board?

A. Yes, sir.

Q. Of various kinds and sizes?

A. Different sizes, yes, sir.

Q. Did you ever have a pulp cargo of the type which has been described here—you have been in court here, have you?

A. Yes, I had the same.

Q. Pulp cargoes of varying sizes and varying weights?

A. Varying sizes and weights; yes.

Q. In your experience is there a customary method employed in the stowing of cargo of the type that you have heard described here, Captain?

A. Yes. I have always found it customary and I have always insisted that it be laid on flooring.

Q. What do you mean by laid in flooring?

A. Well, when they commenced loading the large rolls of pulp, the large rolls *is* laid down over the flooring of the hold. Then they put two end planks, planks that are generally six or eight or sometimes ten inches wide, and they are laid like a platform all over the whole layer of pulp. [fol. 166] Then we put in another layer of rolls on top of them and when that is finished we put another layer of planks and then another layer of paper and so forth, according to the number of layers that we have.

Q. And is that an efficient and safe method of stowing?

A. Well, I found it the only safe way of loading pulp.

Q. How about discharging? How does that help in discharging pulp?

A. I find it is quicker to discharge that way because the rolls are lying on top of these two-inch boards and they can just roll them out to the center of the hatchway and then lift them up.

Q. Is that a safer method of discharging?

A. It is a safe method of discharging, and also it does not do damage to the rolls.

Q. How about the men that are discharging them; the longshoremen?

A. Well, it is perfect for loading and discharging because the operation is the same only in reverse, when you discharge.

Q. Have you ever heard of a word which has been used here and I use that word from the testimony of a witness by the name of Fischer, the second mate, and also Mr. Behrens used it, and that is the chime method—have you ever heard that word?

A. I have never heard that word in connection with any kind of stowage.

Q. I want you to assume, Captain, that in this particular

case the square of the hatch was discharging by lifting it out with the winches.

A. Yes.

Q. But when they got down in the hold under the wings instead of them being on the floor, one of the witnesses described it as pyramid fashion.

A. Yes.

Q. Another witness called them tiered.

A. Yes.

Q. You say you have been here in court so I don't want to go through all of the language again, but you understand how they described that this particular ship was loaded?

A. Yes.

[fol. 167] Q. Have you ever seen pulp loaded that way?

A. No, I don't think so. I have had discussions between masters——

Mr. Behrens: I object to that, your Honor. I don't think we care about his discussions.

Q. Have you yourself ever seen it?

A. No. It has always been on the floor with two-inch wood on top.

Q. Captain, Mr. Behrens, in opening to the jury pointed out some rolls of paper across the street in that building there (indicating Eagle Building).

A. Yes.

Q. Do you see them?

A. Yes.

Q. Did you go over there and look at them?

A. Yes, I did.

Q. And did you talk to the superintendent there?

A. Yes. I asked his permission to go and look at them.

Q. Well, will you tell his Honor and the jury first how those rolls over there are secured, the ones that we see from the window?

A. They are secured at the bottom, the wood is two inches by four inches, and that is laid endways of the roll.

Q. Two inches thick or four inches thick?

A. Two inches thick and four inches wide.

I also notice that they have some large wedges, which are about six inches, tapering off to half an inch. I noticed

several of those were knocked in under the rolls here and there.

Q. When they remove them—that is newsprint, isn't it?

A. Yes.

Q. When they remove them how are they removed?

Mr. Behrens: I object. Did the witness see them removed.

Q. Were you told by the superintendent how they were removed?

A. No, but I know how they are removed.

The Court: No.

Mr. Frank: I have no further questions.

[fol. 168] The Court: Captain, did you use wedges every time that you were stowing this pulp paper?

The Witness: No. There is no necessity for wedges in stowing the cargo across the flooring. Wedges become necessary if they don't do that.

For the safety of the men working in the center of the hatch, the wedges make it more safer.

Cross-examination.

By Mr. Behrens:

Q. When you used this flooring off method you did not need any wedges, is that what you said?

A. Yes.

Q. What do you call—so that we will understand one another—what do you call that method that we see out of the window here on the stowage of that newsprint? What do you call that?

A. I have no name for it.

Q. Suppose you were going to describe to a member of your family that you went to see something in the Eagle Building concerning newsprint—you say that you would not be able to describe to them in one word——

A. Surely, I would be able to describe——

Q. In one word?

A. Not in one word, no.

Q. You say that you don't know of a word used by seamen, masters and stevedores, to describe that method of stowage?

A. I do not.

Q. You have never heard of such a word?

A. I never heard of such a word.

Q. Did you ever hear of stowing bilge and cantline?

A. In the way of rolls of pulp or paper, no. In the case of where we stow barrels——

Q. All right, barrels then.

A. Yes, we have a bilge and cantline.

Q. And the barrels on many occasions are stowed in somewhat that same fashion?

A. No, definitely not.

Q. You think they all should be floored off too?

A. The difference between rolls of paper over there and [fol. 169] barrels is that one roll here is on top of another one, but in barrels you have four barrels and the fifth one goes in the center of the fourth.

Q. That is what you refer to as bilge and cantline?

A. Yes.

Q. Well, let us assume as master of a vessel you have a deck cargo of big pipes or conduits and they are stowed somewhat similar to that newsprint over there in the Eagle Building. What do you call that?

A. I have never seen pipes as you have indicated there stowed that way.

We always put a layer of pipes on the deck and then we put wood all along and then you put pipes on top of the wood, and so forth.

I have loaded dozens of cargoes of pipes on deck that way.

Q. You have never seen it stowed the other way?

A. No.

Q. Let us go back now to your experience of handling pulp and let us go back to the days when you were sailing for the United States Shipping Board?

A. Yes.

Q. Do you remember the ships that you had in those days?

A. Yes.

Q. You were not handling pulp for the Shipping Board, were you?

A. No.

Q. Now, referring to the period 1919 and 1920, when you were on the S.S. Lake Yohara,

A. Yes.

Q. In 1921 when you were on the Watusa.

A. Yes.

Q. And the steamship Wisila of the Bull Line?

A. No, not the Bull Line—well, the Bull Line was appointed receiver of the company that owned the Wisila.

Q. Also in the group of War Shipping Board vessels, you were not handling pulp?

A. No.

Q. The S.S. Westport?

A. Yes.

Q. And the Sundance?

A. No pulp.

Q. And the Wildwood?

A. No pulp.

[fol. 170] Q. Well, that brings us down to the year 1927, doesn't it?

A. That is right.

Q. Oh, yes, we also had the S.S. Pueblo?

A. Oh, yes, I remember her—again, no pulp.

Q. That brings us down to 1928?

A. No. I loaded pulp in 1936 and 1937 for the United States Gypsum Company.

Q. Between the years 1935 and 1940 you sailed two vessels for the United States Gypsum Company?

A. That is right, the Gypsum Prince and the Gypsum King.

Q. During that time isn't it a fact that you carried nothing but bulk cargo?

A. No, that is not the fact.

Q. You carried something besides bulk cargo?

A. Yes, I carried pulp from Menimashee to Albany.

Q. Do you remember testifying as an expert a year ago, I think it was last month, in a case in the Supreme Court of New York County?

A. Yes.

Q. And at that time do you remember that you were asked about the United States Gypsum Company?

A. Yes — no, I don't remember what I was asked but you probably have a record of it there.

Q. Do you remember this question being asked of you, and I refer to page 245 of the record:

"Q. What kind of vessels do they have?
"A. Oh, Gypsum from Nova Scotia to New York.
"Q. Was that cargo?
"A. Strictly bulk.
"Q. No general cargo?
"A. No, strictly bulk."

Now, isn't it a fact that you were handling nothing but bulk cargo for the Gypsum Company?

A. No, because when the Gypsum Company was loaded up and we were not running there then we used to run down to the West Indies or to Chile, and on several voyages I went — Menimashee and I went up with sulphur to the Gulf of Canada, and from there I took cargoes of pulp down to Albany.

Q. Do you call a cargo of pulp a bulk cargo?

A. No. It was certainly not a bulk cargo.

[fol. 171] Q. All right.

A. Well, now, just pardon me a minute. I may say that 90 per cent of the cargo that I carried in the Gypsum Company was bulk and a small 10 per cent was pulp.

Q. And that pulp you got where, in Nova Scotia?

A. No, Canada.

Q. And isn't it customary, coming out of Canada, to stow pulp on end?

A. No.

Q. That is not the Canadian custom to stow pulp on end?

A. No, not in any ship that I have command of.

Q. I am not interested in that. I am interested in the custom.

A. Well, all I can say is it must be the custom in Menimashee to stow it lengthways, because as far as I remember I had no objection to the way it was stowed in Menimashee.

Of course, it is a matter of 16 years ago and a small point like throwing the planks on it lengthwise is kind of hard to remember and I haven't a memory for it, but in my case as

far as I can remember, it was stowed lengthways because that is the only way I would permit them to do it.

Q. Are you familiar with the customs throughout the world——

A. No, I am only speaking from my own experience in the ships that I have carried cargo in.

Q. So that in giving your testimony here you have been telling this jury what you yourself have done in ships that you yourself have sailed?

A. No, not by any means.

I can tell you that for at least four or five years I was on the Baltic Sea run where there is an enormous amount of pulp shipped out of Finland and Sweden.

Q. When was that, Captain?

A. That was in British ships.

Q. No. When was that? About 1912 or 1914?

A. Yes, just before the outbreak of World War I.

[fol. 172] Q. Weren't you sailing the ship warm weather then?

A. No, that was in 1918, at the finish of the war. I am going back now to the Steamship Hube.

Q. That is 1912 and 1913?

A. 1914 and 1915, and previous to that when I was in the Moore Line, I sailed the Chester Moore and I carried pulp from Finland to England.

Q. Isn't it a fact that the custom in the Finnish ports has always been to stow pulp on end?

A. No, not in Finland. Always lengthways with the planks laid down and I can tell you this, and that is the British Board of Trade is very, very particular about that and if you arrive in England and it is not stowed that way you will be heavily fined.

Q. When is the last time that you arrived in England with a cargo of pulp?

A. Just before the outbreak of World War I.

Q. That would be around 1913?

A. No. As far as I remember—there were two voyages before the outbreak of the war—it would probably be about the beginning of 1914.

Q. That is the last time that you carried a cargo of pulp?

A. Except for the Gypsum Company.

Q. Now, let us get down to more modern times, Captain. Let us go back only ten years. You sailed the Sunsweet until she was sunk, did you not, Captain?

A. Yes.

Q. You carried no pulp on the Sunsweet, did you?

A. No.

Q. Then when you came back during the period of April 6th of 1945 to November 5, 1945, you sailed as master of the Cornell Victory?

A. Yes.

Q. Do you remember that?

A. Yes.

Q. And what trade was she engaged in?

A. She was in world wide trade for three years.

[fol. 173] Q. And when you say world wide trade what do you mean?

A. Oh, India, the Orient, all over.

Q. You were not carrying pulp on her during that period, were you?

A. No, I never carried pulp since the Gypsum Company.

Q. And that was some time back previous to 1940?

A. 1936 and 1937.

Q. And that is the last time that you carried pulp, 1936 and 1937?

A. Yes.

Q. Being a ship's master I assume that you are familiar with the book Modern Ships' Stowage, put out by the United States Department of Commerce, Bureau of Foreign & Domestic Commerce?

A. No, I never heard of it.

Q. You never heard of this book (indicating)?

A. Would you mind giving me the title of it again, please? I don't read books when I am master. I go by my own personal experience. After 40 years as master I am capable of loading any cargoes against any Government official who has never seen a ship.

Q. You say that you have never seen this book?

A. I have never seen that book.

Q. I think you said that you never saw stowage on a vessel in chime or in pyramid.

Will you look at that book now and tell us what that picture shows. Tell us about that picture that I mark off (indicating).

A. Well, here——

Q. How do you describe that picture that you see there, Captain?

A. I could not describe it by any one name because I don't know the name for that stowage.

The only thing I can say is it is a very unsafe way to stow.

Mr. Behrens: Let us deem it marked in evidence, your honor, inasmuch as it is a Government publication.

The Court: Mark it for identification.

[fol. 174] Mr. Frank: You do not impress me by saying it is a Government publication.

Mr. Behrens: No, but that it makes it admissible in evidence.

Mr. Frank: I am not so sure of that. Let the Court decide whether it is or not.

The Court: Mark it for identification.

Mr. Frank: That is what I said.

The Court: You have asked this witness about it.

Mr. Behrens: I am offering this paper in evidence as I desire to use it to cross examine the witness about it.

The Court: But he has never heard of the thing.

Mr. Behrens: Because he hasn't heard of it does not make it not admissible. It is a Government publication.

The Court: I do not know anything about it If you have a witness to show that it is admissible——

Mr. Frank: You will have to show it.

Mr. Behrens: In other words, do I understand you do not concede that this is an official publication of the United States

Mr. Frank: The reason I do not concede it is because I know nothing about it, have never even heard of it. I am not going to take the time now, however, in the middle of the trial at this time to read through the very many Government publications that we have been bothered with in the last 25 years.

The Court: It isn't necessary to attack it on the record or anything of that kind. The witness says that he has

never heard of it, and I am going to have it marked for identification.

[fol. 175] Mr. Behrens: And I say that in order to pursue my cross examination I should be entitled to have this marked in evidence, which purports to be by its very terms an official publication of the United States.

Mr. Schwartz: We can give you the authorities which deal with the fact that it is admissible *ipso facto* by virtue of the fact that it is a Government publication.

The Court: I do not know that it is. Anybody that prints a thing can come in and say it is a Government publication. This witness says he has never heard of it, and I have never heard of it.

Mr. Schwartz: That does not affect its admissibility as a Government publication.

The Court: It may be; if it is a Government publication let you come in with a witness to prove it, but I do not know anything about it being a Government publication.

Mr. Frank: Personally I would rather cross examine the guy that wrote this out.

Mr. Behrens: That isn't the problem.

Mr. Frank: That is my problem.

The Court: The only thing that I am saying at the present time the Court is not aware that there is any proof that it is a publication of the Government.

Mr. Behrens: Then I will ask leave to withdraw this witness until I can produce an official of the United States Government to identify it.

The Court: If the other side will now concede that it is a Government publication, I am ready to take it as an exhibit.

Mr. Frank: Let me put it this way. I never saw this, never knew that it was in existence, and if he will give me [fol. 176] a little time to look it over, and tell me what it is that he wants——

The Court: If Mr. Behrens informs you it is a Government publication, will you accept that?

Mr. Frank: I will take his word for it. I will never refuse to take Mr. Behrens' word in anything that he says to me. But that is not my point: My point is this. I have never heard of this book, and I want to see the year of publication. I want to see what the value of it is.

Mr. Behrens: Why don't you do that during the luncheon recess.

Mr. Frank: That is right. I will be glad to.

The Court: We haven't reached that stage of it yet. As it stands now, my difficulty was whether or not it was a Government publication. Now, that is conceded, as I understand it, if Mr. Behrens informs the Court that it is.

Mr. Behrens: Yes, I do thus inform you.

The Court: I will take that concession, and you will accept that?

Mr. Frank: Yes. I will concede that it is a Government publication.

The Court: Now, you can admit that portion that you want.

Mr. Frank: May I have a word?

The Court: You can look at it afterwards.

Mr. Frank: I do not want to read this. Will you just tell me what you want me to look at, this page or this page.

Mr. Behrens: Just the page with the photograph.

Mr. Frank: Page 379?

Mr. Behrens: That is all.

Mr. Frank: Let me look at it during the luncheon recess.

[fol. 177] The Court: Do you want the jury to take the whole book with them?

Mr. Behrens: Only the page, just the page with the picture.

The Court: All right. How are you going to take the picture out?

Mr. Behrens: I will tear it out of the book, if it meets with your Honor's approval.

Mr. Schwartz: We could have it photostated, your Honor.

The Court: All right, that is good. Now we have got that.

By Mr. Behrens:

Q. With what books on the stowage of cargo are you familiar, Captain?

A. With none.

Q. With none?

A. No.

Mr. Behrens: I have no further questions.

Mr. Schwartz: I have none.
Mr. Frank: I have.

Redirect examination.

By Mr. Frank:

Q. These planks, are they a little more expensive to use than dunnage?
A. Naturally.
Q. What?
A. Naturally they are more expensive than ordinary three-quarter inch dunnage; there is more expense attached to laying a floor than piling the stuff on top of each other without a floor.
Q. But it is safer with the men?
A. Definitely.

Recross-examination.

By Mr. Behrens:

Q. You are expressing your own personal opinion, I assume?
A. No, no.
[fol. 178] Q. You are purporting to be here as an expert?
A. No, I am quoting the different companies that I have sailed with that have carried pulpwood, and they have always in their orders insist that I bought two-inch planks, and make a flooring to make sure that we could roll the rolls in and roll them out without damage to the cargo people.

Mr. Schwartz: I move to strike that out as being entirely hearsay.
Mr. Frank: That is what he asked him.
The Witness: He asked me if it was my say, and I said it was not——
The Court: Motion denied. Go ahead.
The Witness: It is not my own say. It is only in my junior days as a commanding officer I had to always make sure that platforms were laid.

Q. Captain, which steamship company is the largest carrier of pulp into the Port of New York, in the last six years? Who is that company?

A. I don't know.

Q. The biggest of all of them, of the companies that bring pulp in?

A. I do not know.

Mr. Frank: You tell us.

Q. Don't you know?

A. No.

Q. Do you know how they carry it?

A. No, no.

Q. Have you seen how it is carried?

A. I have never carried pulp into New York Harbor, except up to Albany, that is all; I used to carry it to the Miller Machinery Company there.

Q. That was in 1936?

A. 1936 or 1937, thereabouts.

Q. Since that time have you ever seen a cargo of pulp in this port?

A. No.

Mr. Behrens: I have no further questions.

[fol. 179] Mr. Frank: That is all. I have no more witnesses, as Dr. Fett is operating this afternoon. My office has been in consultation with him, and he cannot get here until tomorrow morning, and I certainly do not want to interrupt his operations.

With that exception I have no further witnesses.

Mr. Behrens: Then I will waive further examination of this master who has just been on the stand, and I will withdraw this question of whether the book was an official book or not. We will forget all about that, and then I will be prepared to proceed as soon as Mr. Frank finishes with his doctor tomorrow.

The Court: He won't be able to go ahead with his doctor this afternoon.

Mr. Frank: I haven't got him here. He cannot get here until tomorrow morning.

The Court: I say you won't be able to go on.

Mr. Frank: No, your Honor, I will not.

The Court: How about it? You do not want to go on until he finishes, do you?

Mr. Behrens: That is correct. I do not care to proceed until he has completed his entire prima facie case.

The Court: Then we will take a recess until tomorrow morning?

Mr. Frank: Why, your Honor, whatever is your convenience——

The Court: No, no, you say that you cannot produce your witness this afternoon?

Mr. Frank: That is right. I think there is no other solution; Mr. Behrens doesn't want to put his case in until my case is finished.

The Court: And I do not blame him for that.

Mr. Frank: I am not blaming him. So the only thing left is to adjourn until tomorow.

The Court: All right. How about Mr. Schwartz?

[fol. 180] Mr. Schwartz: I am not doing anything until I hear Mr. Frank's complete case.

The Court: Before we take a recess let us see how we stand with reference to this remarkable book. I have allowed it to come in to the extent of Mr. Behrens' suggestion that he take out this leaf that he was interested in.

Mr. Frank: He has now withdrawn the offer.

The Court: Is that right?

Mr. Behrens: That is right.

The Court: The whole thing is withdrawn?

Mr. Behrens: Yes.

The Court: And the jury can forget it?

Mr. Behrens: Yes, your Honor, for the time being.

The Court: All right. Now we will come back tomorrow morning at 10:30. And you have heard enough about this case to know that you should not make up your minds about it at this time. You know that we want to go ahead with this trial without any slant or prejudice of any kind. So don't talk about this case, it may be interesting, but don't talk about it at home or anywhere alse. Wait until the whole thing is submitted to you for your verdict.

All right. Tomorrow morning at 10:30.

(Adjourned to Friday, February 6, 1953, at 10:30 o'clock A. M.)

[fol. 181] MOTIONS

(Trial continued.)

(The following occurred without the presence of the jury in the courtroom):

The Court: Mr. Behrens, I understand you want to make a motion?

Mr. Behrens: Yes, your Honor, I do.

At the completion of the testimony of Captain Andersen yesterday I weighed in my mind the propriety of moving to strike all of the testimony at that time, or whether it might be better to wait until I had a transcript of his testimony available. I decided to pursue the latter course.

Last night I read the transcript of the testimony of this witness, and I now move to strike out all of the testimony on the general ground that it turned out at the end that he was not what he purported to be, namely, an expert on the subject before this jury.

In connection with my motion I should say that his general qualifications as a ship's master are certainly not involved in my motion. My point is that his knowledge of the type of stowage which we have involved here is so obviously limited as to remove him from the field of being an expert on that subject.

In that connection, your Honor, I have found at page 160 of the record which contains his direct examination, what he purports to be. And we find that the question put was: "In connection with your work as master for all these years [fol. 182] did you have occasion from time to time to have pulp cargo on board?" And he answered, "Yes, sir."

"Q. Of varous kinds and sizes?

"A. Different sizes, yes.

"Q. Did you ever have a pulp cargo of the type which has been described here—you have been in court here, have you?

"A. Yes, I had the same.

"Q. Pulp cargoes of varying sizes and varying weights?

"A. Varying sizes and varying weights, yes."

Those questions were put after the captain had described his experience going back almost 50 years, so that at that

point I got the impression from the testimony that he purported to be a master who throughout his experience had carried this type of cargo in sufficient quantities and on a sufficient number of occasions to permit him to testify as an expert.

But then matters started to change a little bit, and I find at page 162 that he had never had pulp loaded the way it was in this case. This is to be found at the bottom of page 162 and carrying over into 163. The question was put:

"Q. Have you yourself ever seen it?

"A. No. It has always been on the floor with two-inch wood on top."

So that at that point it came about that this man said he had never seen the type of stowage involved here.

Then at page 166 he said that he had never seen pipe stowed or conduit stowed in this fashion.

Now, in the cross examination we get down to his actual experience in handling a cargo of this type. I do not mean [fol. 183] that it would necessarily have to be four feet in diameter or six feet long, or odd lengths or even lengths, but cylindrical objects. At pages 169 and 170 of the record I started to ask him these questions:

"Q. Are you familiar with the customs throughout the world"—

And he interrupted me by saying, "No, I am only speaking from my own experience in the ships that I have carried cargo in." So then, your Honor will recall, he testified, to find out what ships he had carried cargo of this type in, we asked certain questions, and this is what we found.

At page 171, that except for the ships of the Gypsum Company, the last time he carried cargo of pulp was about 1914. That is what he said at page 171. And of course that is over 38 years ago. He said at page 172 that he had never carried pulp since he was with the Gypsum Company, and that that was back around sometime in 1936 or 1937. Additionally at page 172 he said, "Would you mind giving me the title of it again?" After I had showed him the book which was the subject of some discussion yesterday, he

said, "I don't read books when I am master. I go by my own personal experience."

Now, to top the matter off I made inquiry about his knowledge of pulp coming in to the Port of New York, after he had told us that he was familiar with no books on stowage of cargo. This is to be found at page 178 of the transcript. The question was: "With what books on stowage of cargo are you familiar, Captain?

"A. With none."

[fol. 184] At page 179 he said that he did not know who the largest carrier of pulp into the Port of New York might be. And then finally to cap the climax at page 180, he told us that he had never seen a cargo of pulp in this port at any time in all his years of sailing. That is to be found at page 180. He said, "I have never carried pulp into New York Harbor."

The question was—let me read the whole thing.

The question was:

"Q. Have you seen how it is carried?

"A. I have never carried pulp into New York Harbor except up to Albany, that is all; I used to carry it to the Miller Machinery Company there.

"Q. That was in 1936?

"A. 1936 or 1937, thereabouts.

"Q. Since that time have you ever seen a cargo of pulp in this port?

"A. No.

Now I say, your Honor, that while he started off testifying along grounds that would lead one to indicate that he had had a wealth of experience throughout his seafaring career in the handling of this type of cargo, it turned out in truth and in fact that that wasn't so. I say under those circumstances to call him an expert on this subject is improper. He has demonstrated that he is not an expert on this subject at all, and I therefore move that his testimony be stricken in its entirety.

The Court: Have you anything to say, Mr. Schwartz?

Mr. Schwartz: I concur wholeheartedly with Mr. Behrens on the basis of the record as Mr. Behrens has read it, and as I recall it, not having the record before me. The captain

indicated that in all his experience he had had a few very isolated occasions, I think one occasion was prior to World [fol. 185] War I, and it dealt with his carrying some pulp to Britain, or having seen it, and that went back to about 1912 or 1914. And in addition his only other experience, as I recall it, was in connection with some pulp that he carried for the Gypsum Company. And I think that that was on not too many occasions at all, on trips which he made from Canada, and which did not come into the Port of New York at all. So I concur in Mr. Behrens.

The Court: What strikes me is this: Mr. Behrens is moving to strike his testimony all out. Now, as a matter of fact isn't it something that you can argue to the jury as to the weight to be given to it?

Mr. Frank: That is my answer, your Honor.

Mr. Schwartz: Before you can argue weight you must have a qualified expert.

Mr. Frank: May I just say something?

Mr. Behrens: If I knew what was ultimately going to come out I would have challenged his qualifications at that very point before he gave any testimony, and your Honor would then be able to pass upon whether he was qualified or not. I mean the question of his qualifications I understand is a problem of law.

Mr. Frank: May I say this very shortly and briefly: Your Honor anticipated my very argument. You have had a lot of experience with the question of expert testimony, and over the years there is only one pattern that has ever stuck into my mind, and that is as to the weight to be given. That is definitely a question for the jury.

The Court: Yes.

[fol. 186] Mr. Frank: I do not think it is necessary to go any further for the prima facie case, I think the testimony as it is is sufficient for that purpose, so that this question of weight, sufficiency, and even as to whether or not the man is qualified I think he was qualified, and therefore I think that the only question left is for argument to the jury, and not for the Court.

Mr. Behrens: I would only like to say this further fact, as a preliminary matter a witness must qualify as an expert. If on his preliminary testimony it should have ap-

peared, for example, that this was not a master, that this man had never even seen a cargo of pulp or other cylindrical objects, if all of those things had developed and then Mr. Frank had asked him for his opinion, I would object on the ground that he is not qualified.

Mr. Frank: The answer is that I would not ask him.

Mr. Behrens: Excuse me. At that point your Honor is not going to let the jury determine whether this man is a qualified expert or not; that is a problem for the Court, whether the jury should consider it. If you feel that he is a qualified expert, some man well versed in this subject, of course then the weight of his testimony is for the jury, but somebody other than the jury is to determine whether he is an expert or not.

The Court: I will deny your motion and give you an exception. And I give an exception to Mr. Schwartz, too.

Bring the jury in.

(The jury enters the courtroom.)

[fol. 187] HERBERT C. FETT, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Frank:

Q. Dr. Fett, you are a physician?

A. I am, sir.

Q. And have been for how many years?

A. Since 1913.

Q. And you have specialized in some branch of your profession?

A. Yes.

Q. What is that?

A. Orthopedic surgery.

Mr. Behrens: I will concede his qualifications in that field.

Mr. Schwartz: So will I.

The Court: Do you want them on the record?

Mr. Frank: Well, just one more. I am not going to put too many questions.

Q. Just let me put this question this way, Doctor: You have specialized in orthopedic surgery for how many years?

A. For about 25 to 26 years.

Q. And how many hospitals have you been and are you now connected with, just give me a rough idea as we do not want to have to spend too much time on this?

A. I am connected with the Long Island College Hospital, Kings County Hospital, St. Charles Hospital, Holy Family and St. Peters.

Q. Have you any record as to when you first became in contact with Palazzolo?

A. Yes.

Q. When was that, Doctor?

A. On January 20, 1950.

Q. And you have been seeing him ever since?

A. Yes.

Q. Both in the hospital as well as, was it at your office or was it always at the hospital?

A. At my office occasionally.

[fol. 188] Q. And the last time that you saw him was when?

A. January 23, 1953.

Q. And have you got any notes as to when you are to see him again? If you have any difficulty about that——

A. I have nothing in my notes.

Q. He told me March 16th, I think. Did you give him a slip, or your secretary give him a slip, when he was to call again at your office, Doctor?

A. I don't know.

Q. Now, Doctor, you knew of course that he had been in two other hospitals prior to the time that he came into Long Island?

A. Yes.

Mr. Frank: May I come up here, your Honor?

The Court: Yes.

Q. (Showing witness paper) I imagine that is your secretary's note?

A. Yes.

Q. That says that on March 6th you are to see him?

A. At 2 P. M., yes, sir.

Q. The first hospital that he was in was the Norwegian Hospital where he was admitted on the day of the accident, July 20, 1949, and from which he was discharged on March 9, 1950.

Mr. Frank: I have the records under subpoena of the Norwegian Hospital, and I offer them in evidence.

Mr. Behrens: I do not have any objection.

(Marked Plaintiff's Exhibit 4 in evidence.)

Q. Doctor, would you be good enough—the idea is that if there is any term here that is not quite clear I am going to ask you to explain it. Will you just give me the final diagnosis, would you read it?

A. Multiple fractures of left lower extremity; fracture of left femur, paralysis of peroneal and tibial nerves, infection left leg.

Q. That was the diagnosis that was finally entered when [fol. 189] he left the Norwegian Hospital on March 9th, is that right?

A. It is so marked, sir, on this record.

Q. Just as a matter of form, will you give us the admission notation?

A. Contusions and bruises left thigh; fractures left femur, tibia and fibula.

Q. The femur is the thigh bone?

A. That is right.

Q. And the tibia is the front bone and the fibula the back bone of the lower leg?

A. No, sir.

Q. Then you tell us what they are.

A. The tibia is the large bone, the shinbone, and the fibula is the smaller bone on the outer side of the leg.

Q. Tell me this: Would you give me the first X-ray taken? Doctor, you can either read these X-rays yourself, or as you know the hospital has the X-ray diagnosis by their roentgenologist. I do not want to clutter the record with too many of these, but I will have to put some of them in.

Mr. Frank: I offer two of these in evidence from the Norwegian Hospital.

Mr. Behrens: No objection.

(Marked Plaintiff's Exhibits 5 and 6 in evidence.)

Q. Doctor, would you be good enough to come over here; take the large one first. Now, this is Exhibit 6; what does that show?

A. It shows a transverse fracture at about the center of the femur, together with some comminuted fractures in the lower left involving the tibia and fibula. The fracture of the femur shows displacement; the lower fragment is displaced posteriorly and medially, that is toward the inner side and backward.

The fracture of the tibia is in satisfactory position, and the fracture of the fibula is in satisfactory position. The fracture of the tibia enters the knee joint.

Q. What is the significance of that?

A. A fracture which enters a joint always necessitates a guarded prognosis as to the subsequent function of the joint.

[fol. 190] Q. I have here a view, Doctor, that has been marked Plaintiff's Exhibit 5. Will you tell the jury what that shows?

A. This is an 8 x 10 film which shows a side projection of the lower thigh and the upper portion of the lower leg. The fracture line in the tibia can be seen running up into the joint, and there is a fracture line of the fibula. There is also some displacement of a small fragment coming from the tibia; the patella, which is the knee cap, is intact, and the lower portion, that portion of the femur which is shown on that X-ray film apparently shows no evidence of fracture. The fracture in the femur is above.

Q. Doctor, have you seen the operation chart at the Norwegian Hospital?

A. Yes.

Q. You can refresh your recollection from it should you desire; it is in evidence. Would you tell us what was done in that operation?

A. The fracture of the femur was reduced by open operation, and a plate was inserted, a metal plate and maintained in position by screws.

Mr. Frank: I offer these in evidence.

(X-rays marked Plaintiff's Exhibits 7 and 8 in evidence, respectively.)

Q. I show you Plaintiff's Exhibit 7; would you be good enough to tell the Court and jury what that indicates? Is that after the open reduction?

A. It is, sir. The fracture of the femur can be seen on this view which is taken from front to back. The fracture has been satisfactorily reduced, and it has been maintained in position by this metal plate. The screws can be seen here, the fracture site here.

This is a side view in which the plate can be seen with the screws going through the hard portion of the bone, through the marrow cavity, and approximating the hard or cortical portion of the bone on the opposite side.

[fol. 191] Mr. Frank: I ask that these two X-rays be marked as exhibits.

Mr. Behrens: No objection.

(Marked Plaintiff's Exhibits 9 and 10 in evidence, respectively.)

A. (Continuing) Apparently the plate is loosening somewhat, as it is pulling away from the bone and you can see some absorption of bone around this screw. This must be a projection not immediately post-operative.

Q. Doctor, you will see the dates right here. This is February 9, 1950, I wasn't able to get them in order.

I want to give you another one. I have here one of December 3, 1949; that is Plaintiff's Exhibit 9. Will you tell us what that indicates?

A. That film is a projection showing the femur with the fracture in the midportion. The plate is in place; the reduction is quite satisfactory, perhaps a minimal amount of distraction, that is, the ends are somewhat apart. This screw seems to be somewhat loose, the lower screw in the plate.

Q. Doctor, let me ask you this: The attempt of this reducing the fracture was to bring the two bones together as closely as possible?

A. Yes.

Q. And the purpose of this metal plate was to throw out callus?

A. Yes.

Q. And to get union?

A. Yes.

Q. Was union ever gotten here in this man's leg?

A. The man still has no union.

Q. Still has no union today. That is what the doctor try to do by putting this plate in there; is that the idea?

A. That is right, sir.

Q. Now, I do not know. I just want to show what the date is here——

A. Perhaps I should qualify that last statement: When I said no union, when I said no union I mean the union is not solid, it is not a weight-bearing extremity, patients have a rubbery feel to their leg, it doesn't feel solid.

[fol. 192] Q. Is that what you call fibrous union?

A. It may be fibrous union or it may be non-union. There is such a thing as fibrous union.

Q. Have you been able to determine whether it is fibrous or non-union?

A. If there was any fibrous here we broke it up at the time of our operation when we put the intermedullary pin in.

Q. This is probably a repetition of one of the other X-rays so I won't put it in.

Let me ask you this, Doctor: This first operation, which was an open reduction, was that done under a general or local anesthesia? Would you glance at this?

A. It is described as a spinal anesthesia.

Q. Novocain was used?

A. Novocain was used.

Q. Is there anything in this operation chart, just refreshing your recollection from it right here, that you want to tell us about as to what they found in inserting the plate, anything of significance to you?

A. There isn't anything in there that I would like to emphasize.

Q. Now, on August 31st at the Norwegian Hospital, something occurred as far as his leg is concerned. Would you tell the Court and jury what it was by glancing at this?

A. According to the record, sir, he developed cellulitis of the left leg.

Q. Is that infection?

A. Yes.

Q. With what?

A. With lymphadenosis and lymphangitis. Lymphadenosis of an extremity is commonly referred to as blood poisoning and red streaks go up the extremity. The infection then is opposed by the glands which act to prevent further damage, and lymphangitis. Lymphadenomatosis are the swollen glands in the groin area and the armpit.

Q. There is another operation I think that you will find on the other side of that. That was on September 15, 1945, can you tell us about that?

A. That is what we call a debridement operation. That is a clearing up of the infection, and he subsequently had [fol. 193] a cast applied. The patient was taken to the operating room, and the ulcer was cleaned and a dressing applied, and a long plaster Paris cast was applied.

Q. That was the first step in trying to clean up the cellulitis, would you say?

A. That is right.

Q. Is this a neurological report (handing witness paper)?

A. That is right.

Q. I just want you to tell the Court and jury what this indicates, using your own language, please.

A. This patient was examined by Dr. Perkins, the neurologist, and his conclusion was that the patient had paralysis of the extremity, the paralysis involving the sciatic nerve together with its branches, the common peroneal and the tibial.

Q. When the final diagnosis was made and you read about paralysis of the peroneal and tibial nerves, that is what you meant?

A. Yes.

Q. Dr. Perkins, is he also connected with the Long Island College Hospital as a neurologist?

A. Yes.

Q. He is a well-known neurologist, is he not?

A. Yes.

Q. On the 25th of January, Doctor, there is another record of an operation. Will you tell us what that consisted of?

A. This was another operation in an attempt to clear up the cellulitis. Incisions were made and drains inserted in an effort to overcome infection.

Q. In other words, the first one after which they applied a cast did not succeed, so they had to try again, is that the idea?

A. I do not know. I wasn't there.

Q. All right. Was there a blood transfusion given to him, according to the record?

A. According to the record there was, yes.

Q. And that was on July 21st?

A. According to the record.

Q. I am going back again, the way these records are. [fol. 194] The laboratory test showed certain positive cultures; what were those, Doctor?

A. Bacillus proteus.

Q. Which means?

A. Well, that is one of the various forms of bacilli which cause infection.

Q. Is that a form of putrified matter?

A. It could be staphylococcus, streptococcus, influenzacoccus, diphtheratic, whatever it might be, this is in the classification as far as the laboratory is concerned as to the general type of organism which caused the infection.

Q. As I said before on March 9, 1950, he was removed to St. Vincent's Hospital.

Mr. Frank: I offer in evidence the St. Vincent's Hospital record.

(Marked Plaintiff's Exhibit 11 in evidence.)

Q. Doctor, would you be good enough to read the diagnois from the St. Vincent's Hospital record upon entry?

A. Fracture of the left femur without union, following fracture of left tibia with cross union.

Q. What is cross union?

A. The union between the tibia and the fibula. Ordinarily there is a space between the tibia and the fibula, and when repair takes place occasionally the callus will bridge that space.

Q. It bridges over?

A. And produces union between the two bones.

Fracture of the left fibula with cross union, compression of sciatic nerve by fracture contiguous bone.

Q. Contiguous. In other words——

A. The bone that was fractured.

Q. The compression was by the bones that were fractured?

A. Af the fracture site. Infested wound, left leg by proteus vulgaris.

Q. That is one of the types infection——

A. That is one of the organisms, yes.

Q. I wonder, Doctor, there won't be many, would you just glance at this and I wonder whether you could explain [fol. 195] either this one or that one to the jury, as to what they did there when he came in with this infection? You saw these records, did you not, Doctor?

A. I did, sir.

Q. He was brought in there for the purpose of clearing up the infection, is that the idea?

A. That is right.

I think I can cover this entire procedure by saying that at St. Vincent's Hospital they had minor debridement operations, cleaning up the wound, removing all the slough tissue, by which I mean dead tissue, establishing adequate drainage, and using various forms of antibiotics in an effort to overcome this infection and heal the wound.

Q. I think that is sufficient. Now, Doctor, I notice a chart here indicating lack of sensitivity or hypersensitivity in that leg. Would you take a glance at that and tell us what they found?

A. Yes, they found that the areas supplied by the common peroneal and tibial nerves showed diminution under various types of sensation. That is what we call hypothesia, which is diminished sensation, and there were some areas of anesthesia in which there was complete loss of sensation.

Q. And that is all illustrated by a chart here in the records.

Doctor, instead of going through some X-rays which I will look for in a minute, would you be good enough to explain this X-ray to the jury and then I think I am finished with those records.

A. An X-ray report dated March 31, 1950, revealed a fracture of the lower shaft of the left femur with non-union, a plate with screw fixation was noted, and there was some reaction about the lower screws. Some bowing was present

at the site of fracture. No evidence of callus could be demonstrated.

A healed fracture was present in the upper shaft of the fibula in good position. An oval radial lucent defect was seen in the soft tissue between the tibia and the fibula in the upper third of the leg which may correspond to a drain sinus.

[fol. 196] Mr. Frank: I ask that that X-ray be marked in evidence.

(Marked Plaintiff's Exhibit 12 in evidence.)

A. (Continuing) A generalized osteoporosis of the left leg was noted.

The report here states that there was no evidence of a lithic lesion. By that they mean a destructive lesion which might suggest the presence of tuberculosis.

Q. In other words, they ruled that out as one of the factors involved in non-union, is that it?

A. No, that isn't what this is emphasizing here, sir. They were talking about the knee joint which is far away from the site of the fracture.

Q. I am sorry. Doctor, the osteoporosis, it says, is seen involving the components of the left knee joint. What is osteoporosis?

A. That is a decalcification, a diminution of the calcium constituent of bone, demonstrable by a thinning appearance, on X-ray particularly.

Q. You mean when the lime salts leave the bone you can see it in X-rays by shadows and lights?

A. Yes.

Mr. Frank: I ask that this X-ray be marked in evidence.

(Marked Plaintiff's Exhibit 13 in evidence.)

Q. Doctor, I will just use this one X-ray out of St. Vincent's.

A. This is an anteroposterior view, that is a front to back projection. The fracture site is still visible; the metallic fixation is apparently in good position on this film. There is some distraction. On the side view we again see the fracture site with no evidence of bone repair. These screws

are in excellent position. The plate is flush against the upper fragment, and in the lower fragment it has separated, the screws are pulling out, and there you can see the bowing which is mentioned in the report.

[fol. 197] Q. Any union?

A. No, sir.

Q. There is obviously not?

A. No, there is not.

Q. Doctor, is the osteoporosis seen in this particular picture?

A. I think it is quite apparent when we compare this fragment with this fragment; the density of this bone is much less than the density of this bone. The cortex of this bone here, that is the hard portion of the bone, is much thinner than it is here. This is much thinner than it is here. The demineralization plus the thinning of the cortex, plus the beginning of a false joint here, as is evidenced by the cupping, are the three usual signs of non-union.

Q. Doctor, just glancing through the temperature and pulse charts, have you any comment to make upon what they indicate without going through them all, just a general survey?

A. They have no particular significance.

Q. Do you remember, Doctor, whether it was in the Norwegian Hospital or some other hospital, that a great deal of penicillin was given to him, or was it in your hospital? Do you remember, did you see it when you examined the records?

A. No, I don't remember seeing that.

Q. Let us look at the Norwegian Hospital records. Yes, Doctor, while in the Norwegian Hospital, outside of the blood transfusion, by glancing through this penicillin record, was there a great deal of penicillin shots given to him?

A. 8,300,000 units.

Q. I think that I failed to ask you, he was discharged from that hospital on August 4, 1950. At that time had the infection cleared up, Doctor?

A. At the time of my report dated September 25, 1950, I reported that all the wounds of the leg had healed, lower leg, that the motor-sensory changes were still present.

Q. The infection had cleared up?

A. Yes.

[fol. 198] Q. But the nerves, the motor and sensory changes were still present?

A. That is right, sir.

Mr. Frank: Now I ask that the Long Island College Hospital records be marked in evidence.

(Marked Plaintiff's Exhibit 14 in evidence.)

Q. Doctor, his admission to the Long Island College Hospital, so far as the records indicate, were six in number, and these records, of course we have to read them backwards a little.

The first admission was on September 21, 1950, and he remained there until November 24, 1950, and that was the time that he came under your care; is that right?

A. Yes.

Q. Would you be good enough to tell us the first operation, that was made by you, was it not, Doctor?

A. Yes.

Q. Who is H. C. Fett, Jr.?

A. That is my son.

Q. He practices with you?

A. Yes.

Q. Was that under a local or general anesthesia?

A. General anesthesia.

Q. Would you be good enough to tell the jury what was done at that time?

A. The plate and screws were removed, and an intermedullary nail was inserted.

Q. In place of the plate and screws? What is an intermedullary nail?

A. It is a metallic nail which extends practically through the medulla cavity of the bone, that is the marrow cavity; instead of holding it from the side, it is put into the marrow cavity and acts as an internal splint.

Q. That is an open reduction, again, or rather you had to open up again, didn't you, the fascia?

A. That is right, that is when we broke up whatever fibrous union he had.

Q. What did you figure to do by that type of method, Doctor?

A. We felt that that would act as a splint, and that he [fol. 199] would be allowed to bear weight on it early, and in that way stimulate repair.

Q. You figured that the plate had been in there long enough without accomplishing anything, is that right?

A. Yes, sir.

Q. And that medical science indicated another measure?

A. That is the idea.

Q. And that was the measure that you attempted?

A. Yes, sir.

Q. That was done on September 28th?

A. September 28th, yes.

Q. He was given a blood transfusion before the operation on September 27th, was he not? Am I right in reading that?

A. A transfusion is usually given at the time of operation. The blood is ordered the day before, and that is why that date is on there.

Q. Now, this X-ray, will you just look at that, Doctor? Was that X-ray taken after the operation? Have you got those X-rays from the Long Island College Hospital?

Mr. Frank: I ask that this X-ray plate be marked in evidence.

(Marked Plaintiff's Exhibit 15 in evidence.)

Q. Doctor, before we get to the operation, would you be good enough to tell us what this shows? This is Plaintiff's Exhibit 15, and that was apparently taken in your hospital before the operation?

A. This again shows the fracture of the mid femur with the plate, six screws, absorption about the lower screws, the plate separating from its usual or original site, and some bowing.

Q. And when you saw that then you decided to adopt the other method that you called the intermedullary——

A. Insert an intermedullary nail.

Q. Intermedullary nail?

A. Yes.

Mr. Frank: I ask that this X-ray be marked as an exhibit.

[fol. 200] (Marked Plaintiff's Exhibit 16 in evidence.)

Q. Now, that is at the time that the nail is in, is that it?

A. Yes.

Q. How long after the operation was this X-ray taken?

A. This was taken in November, about two months after the operation.

Q. Two months. I see this is the one that you just read before, Doctor.

Now, this is the one taken right after the operation?

A. That is right.

Q. What does that indicate? What does it show at that time?

A. On September 28th it revealed evidences of the fracture, and the intermedullary nail in place.

Q. All right, Doctor. Is there any other X-ray there before I put them in evidence will you look at these two and tell me whether there is something that you want to show in either one?

A. This is a film taken two years later.

Mr. Frank: I ask that that be marked in evidence.

(Marked Plaintiff's Exhibit 17 in evidence.)

The Witness: This was also taken two years later.

Q. Which one of them do you want to use? Do you want to use either one, just to demonstrate what it shows?

A. Both of them.

Mr. Frank: All right, we will mark this one also, then.

(Marked Plaintiff's Exhibit 18 in evidence.)

Q. All right, Doctor, both of them were at about the same time?

A. Both taken on the same day.

Q. Will you tell the Court and jury what, if any, effect the intermedullary pin had?

A. A union did not take place as a result of the intermedullary fixation with the nail, so it was decided to put [fol. 201] bone into this patient's leg in an effort to stimulate

bone formation. So a bone graft operation was done. This film shows the intermedullary nail in place with evidences of bone grafts put in about the fracture site. This film——

Q. This is Exhibit 17. I think this is one. This is the old one——

A. This is 11/20/50.

Q. This is the one you probably want?

A. Yes, this is 11/22/52. This is a film taken in another plane. It shows the intermedullary nail in place; it shows some bone chips here, and bone chips placed along the fracture site.

Q. All right, Doctor. I do not think I am going to bother you with any more X-rays.

Doctor, I will just hurry through the other admissions until the final one, the last one rather. Thereafter he was admitted for changing of the cast on March 1, 1951, for some four days, until March 4th?

A. Yes, sir, that was a cast change.

Q. And the next admission was on April 4, 1951; to April 6, 1951; was that also for a cast change?

A. Yes.

Q. That was all under your direction, Doctor?

A. Yes.

Q. Thereafter, the fourth admission was on July 2, 1951, to July 4, 1951?

A. That is right, sir.

Q. Another cast change, was there not?

A. Yes.

Q. Reapplication of a cast?

A. Yes.

Q. Is that right?

A. Admitted for removal of cast, X-ray evaluation and reapplication of cast.

Q. Whoever did that did it under your supervision?

A. Yes.

Q. Now, the fifth admission was on September 28, 1951, to October 3, 1951, six days. What was that cast for?

A. He was admitted for an evaluation. His cast was removed, and he had an X-ray examination.

[fol. 202] Q. You still wanted to find out to what extent that nail helped or didn't, is that the idea?

A. That is right.

Q. Then the last admission was on November 16, 1952, where he remained for 18 days to December 3, 1952. That is the time you did a bone graft?

A. That is right, sir.

Q. Would you be good enough to describe that operation, Doctor? You have your notes, I take it, of this, so you do not need these records.

A. A seven to eight-inch incision was made along the front of the thigh toward the outer side, and the old scar was removed. The bone was exposed, and a diamond-shaped section of bone about two and a half inches in length was removed with a mallet and chisel, after it was outlined by means of a drill. Cancellous bone chips were put in the defect. The punch of the nail is about in this particular region and it was found to be in good condition. The wound was closed in the usual way, and it was noticed that the patient withstood the operative procedure well.

Q. I just want to ask you this: When you got through with the bone graft was the nail still in there?

A. Yes.

Q. What did you do that for? What is the theory or technique of that, the graft?

A. To stimulate the bone formation.

Q. You put chips of bone in there?

A. That is right from a bone bank.

Q. Do you know now whether it has done him any good or not?

A. It is too soon to tell.

Q. When will you be able to tell approximately?

A. About eight months post-operatively.

Q. Eight months from now?

A. From the date of the operation.

Q. I notice that he is to come to your office on the 6th of March. What do you expect to do? Will you be able to evaluate whether the bone graft has taken?

A. It is quite possible we will admit him to the hospital, [fol. 203] or refer him to the hospital for a change of his cast and X-ray evaluation.

Q. In other words, after you had done the bone graft you put a cast on, and that cast he has on now?

A. Yes.

Q. You are probably going to reapply another cast?

A. It is quite possible, sir.

Q. Tell me this, Doctor: In these bone grafts, and I know you have had a lot of experience with them, it is a chance whether they take or not; am I right?

A. All bone grafts do not take. Most bone grafts will take under good conditions.

Q. What do you mean by under good conditions, Doctor?

A. Providing there is no infection, providing the patient's general health is good, providing the donor's site is carefully selected.

Q. What do you mean by that?

A. The site from which the bone is taken. There are many things which enter into the question of bone grafting. Immobilization is a factor; technique is always a factor.

Q. I know the technique was good. Tell me this, Doctor: Would the fact that there was a lot of osteoporosis, is that a help or a hindrance to the bone graft taking?

A. It doesn't make any difference.

Q. It does not of itself?

A. No, sir.

Q. What factors as to the structure, the adjoining structure in which the bone graft has been inserted are important?

A. The chief thing is circulation.

Q. You have got to mtaintain that?

A. That is right.

Q. All these infections and other things——

A. Are secondary.

Q. All right, Doctor. Tell me this, so far as your present prognosis is, as you are sitting here now, with reference to this man, will you give us your best idea as to a prognosis? First of all will he ever be able to have a workable leg? I mean working as a laborer, you knew that he was a longshoreman, did you not?

A. Yes.

[fol. 204] Q. In your opinion could he ever work as a longshoreman?

A. I do not think so.

Q. Could he ever do any work that requires laboring, I mean?

A. I do not think that he ever will.

Q. What is the best that you hope to accomplish? Let us take it that everything turns out well, that the bone graft takes.

A. We hope to get union in the fracture site which will give him a stable leg. He will undoubtedly have disability due to his nerve injuries in the form of a foot drop.

Q. That is the paralysis that you were talking about?

A. That is right, and he will have limitation of motion at his knee joint.

Q. Do you ever expect him to discard the crutches he has had? Do you ever expect him to drop these crutches?

A. I certainly do, sir.

Q. Have you any idea when, or how long that will be?

A. As soon as that femur becomes solid we expect him to discard his crutches.

Q. All right. Let us assume he discards his crutches, and he has what you call with the bone graft taking a weight-bearing leg. Under those conditions you say the foot drop, that is the paralysis, he will still have that?

A. That is right.

Q. That anesthesial and hypothesia, will those continue?

A. I expect they will.

Mr. Frank: That is all, Doctor, I think.

Mr. Behrens: I have no questions.

Mr. Schwartz: I have none.

(Witness excused.)

The Court: Is that the plaintiff's case?

Mr. Frank: That is the plaintiff's case, your Honor. Will your Honor pardon me a moment? Just one little thing I want.

[fol. 205] No, plaintiff rests.

Mr. Behrens: I should like to be heard on certain matters of law at this time, if your Honor pleases.

The Court: Then we will excuse the jury while you make those motions.

Mr. Frank: Will your Honor give me a little recess? I need a little time.

The Court: Why, yes.

We will take a ten-minute recess, and we will then come back, but you will keep the jury out there until we get through with the motions.

(Short recess.)

(The following was heard without the hearing of the jury):

MOTIONS TO DISMISS AND DENIAL THEREOF

Mr. Behrens: If your Honor pleases, on behalf of the defendant, Pan Atlantic Steamship Corporation, I move to dismiss the complaint on the ground that plaintiff has failed to establish a prima facie case; that, if the defendant were to rest at this point of the trial, any verdict to the plaintiff would not rest upon anything but sheer conjecture and surmise; in that regard, your Honor, I wish to point out to your Honor two factors, and I will be very brief: As I understand the testimony of the witnesses, three of them have been called here from the whole to establish liability, yet each varies from the other. I have sat here trying as objectively as I can to get a picture in my mind of what did happen in the hold. I appreciate that being an advocate I can never be entirely objective, but I will say to your Honor [fol. 206] very frankly, having heard three different versions of what happened there, that I don't know what did happen.

Your Honor, how could the jury know at this stage of the proceeding what happened when there is this basic conflict in the testimony which the plaintiff has presented?

As I said in my opening to the jury, I suspected, and my suspicions or conclusions now seem to have been well founded, that there were only two problems in this case, one was the question of the propriety of this stow, *per se*; and the other was the question of what there was wrong, individually, with the stow.

Now, as I say, I frankly do not know which of these versions, if any, is to be accepted, because there is obviously the conflict among the three versions.

Your Honor, when we come to the faulting in the stow

and the question on the chine method of stow, we have testimony of self-appointed experts, and beyond that there is nothing in plaintiff's case.

Accordingly, I made my motion to dismiss the complaint on the ground that plaintiff has failed to establish facts which constitute a prima facie case.

Mr. Schwartz: In so far as the third-party defendant is concerned, I join in the motion, and I would like to add one further ground: As I understand the testimony thus far of the lay witnesses, the longshoremen, not only is there conflict as to how the accident happened, but in order to tie it all up, the *quasi* expert, Captain Andersen, constantly said throughout his testimony, as I remember it, not having the benefit of the record, but when constantly being inter [fol. 207] rogated by Mr. Frank as to whether there was a safer, and I use the comparative advisedly, whether there was a safer method, his testimony was, "Yes, on the basis of my opinion, on the basis of my limited experience," which he delineated.

Now, I say the test in any negligence case is not whether there is a safer method of doing anything; there is always a safer method of doing something after an accident has happened. Hindsight is a wonderful determiner. The test is whether the method that was used was reasonably safe under the attendant circumstances.

I say there is no testimony here that would allow the jury to draw an inference that the method that was used, assuming that the witnesses are to be believed, and there is that conflict among them, was unsafe.

The Court: I see.

Well, I will deny both motions and give each of the counsel an exception.

We will now bring the jury back.

Mr. Behrens: I should also like to make a further motion, your Honor.

The Court: All right, we will wait with the jury.

Motions for Directed Verdict and Denial Thereof

Mr. Behrens: I should also like to move for a directed verdict at this time in behalf of the defendant on the ground that any verdict for the plaintiff on the basis of the testi-

mony elicited here would be thoroughly and completely against the weight of the evidence.

Mr. Schwartz: I join in the motion on behalf of the third-party defendant.

[fol. 208] The Court: Both of those motions are denied. I give you an exception in each case.

Now, bring the jury back.

(At this point the jury entered the jury box.)

Harold R. Rosengren, called as a witness on behalf of the defendant and third-party plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Behrens:

Q. Would you state your present occupation, sir?

A. I am director of safety and cargo danger prevention for the Moore-McCormack Lines.

Mr. Frank: I couldn't hear that.

The Witness: I am director of safety and cargo danger prevention for the Moore-McCormack Lines.

Q. For what company?

A. The Moore-McCormack Lines.

Q. How long have you held this present position with Moore-McCormack?

A. Since 1947.

Q. Previous to that, were you connected with Moore-McCormack?

A. I was, sir.

Q. In what capacity?

A. In the capacity of second officer, first officer, and master.

Q. You sailed vessels as a master for Moore-McCormack?

A. I did, sir.

Q. In this case, Captain, we are discussing the stowage of certain cylindrical objects or rolls which have been referred to as paper pulp, and which have been described

as of uniform diameter of about four feet and of various lengths, perhaps four, five or six feet. Do you understand what the problem is here, the nature of the stow involved?

A. I do.

[fol. 209] Q. Now, are you familiar with the stowage of cargo of that general description, pulp or print rolls of paper?

A. I am, sir.

Q. Captain, in the last six years, how many ships have you seen with stow of commodities of this general character?

A. I would estimate that I would see a ship every ten days.

Q. About every ten days you would see a ship——

A. A ship with this commodity.

Q. Now, during that period of time, have you ever seen a ship with commodities of that type where a so-called flooring off method has been used?

A. No, I haven't.

Q. Would you describe to the jury how every one of those vessels with such commodity has been stowed?

A. They have been stowed on the flat or the bilge in what is called the chine method.

Q. Now, is the chine method the one which we roughly see out here (indicating), with the second tier dropping down into the trough created by the other two below; is that what we understand by the chine method?

A. It is a nesting method.

Q. You have heard that word before today, have you not?

A. Yes, sir.

Q. You understand what the chine method is?

A. I do.

Q. Now, let us assume—well, let me ask you this question first. Have you ever heard of flooring off print or pulp in the No. 3 lower hold; have you ever heard of that having been done in all of your experience?

A. No, sir, I never have.

Q. Have you ever heard it advocated by anyone?

A. No, sir, I have never heard it advocated.

Q. Let us assume now for the purpose of discussion

that rolls were put down in a hold and then a floor was built over them, and then another tier put on and a floor [fol. 210] put on, and let us assume you didn't chock any of the rolls, you put no chocks under them because of this flooring off system. Now, what in your opinion would happen the minute the vessel got to sea?

A. Unless that stowage was absolutely tight, you would undoubtedly have a shifting of cargo.

Q. What would happen with the shifting of the cargo?

A. It would naturally endanger the safety of the vessel.

Mr. Schwartz: Will you talk a little louder, please?

The Court: Will you repeat that answer?

(Question repeated by the reporter, together with the answer.)

Q. Now, Captain, how feasible is it with rolls of uniform diameter ever to get a complete stow across a vessel, bearing in mind the different contours of the ship; is that practical or possible?

A. It is neither practical nor possible.

Q. In the course of your own work as a safety man for the Moore-McCormack, and in your going aboard these vessels which handle print or pulp, do you refer to any book which is recognized to assist you in determining how such a cargo should be stowed?

A. I have referred to several, Modern Ship Stowage, a Department of Commerce publication.

Q. You do refer to that book, do you?

A. I have used that.

Q. Is that this book (indicating), which is put out by the Department of Commerce?

A. That is right.

Q. That is the one you refer to. What other books on stowage do you refer to?

A. I have used a publication put out by the Finnish-Mills Association whom I consider to be experts on the subject of handling pulp or paper.

Q. Is this the book to which you refer?

A. Yes.

[fol. 211] Mr. Behrens: I wonder if we may have this marked in evidence.

Mr. Frank: In evidence?

Mr. Behrens: Yes.

Mr. Frank: I object to it. I object to a book being marked in evidence.

You don't claim that this is a United States Government book?

Mr. Behrens: No. All I claim is that it is one commonly referred to in connection with such matters.

Mr. Frank: I object to it on the ground it is incompetent, irrelevant and immaterial.

What is this, a Finnish publication?

Mr. Behrens: It is so printed in Finnish and English.

Mr. Frank: I object to it.

The Court: Instead of having the book put in evidence, instead of having that in the record, do you have any particular portion of it which you wish to have?

Mr. Behrens: Yes, there are certain photographs in here, your Honor, which are illustrative of the method of stowage and of chining up.

There has been offered to this jury no picture showing in a ship this question of stowage and chines, and I would like them to see that as illustrative.

The Court: And you have relied on that in your work, have you?

The Witness: I have referred to it for the reason that Finland is probably the greatest exporter of newsprint and pulp.

The Court: All right, I will take it. I overrule your objection, and I will give you an exception.

[fol. 212] The Clerk: Defendants' Exhibit B in evidence.

(Book referred to received in evidence as Defendants' Exhibit B, as of this date.)

Q. Now, Captain, I wonder if you would be good enough to look through Defendants' Exhibit B and select such picture as you feel would show in a ship the chine method of stowage so that we may have the jury look at it and have a photograph of what the chine method is.

(At this point the witness indicated a photograph.)

Mr. Behrens: You want to see it, Mr. Frank, before I show it to the jury?

Your Honor, I want to show him this photograph which this witness has selected. I wanted to show the chine method of stow.

(At this point Mr. Frank examined the photograph.)

Mr. Frank: Go ahead and show it to the jury.

(At this point the jury examined the photograph.)

Mr. Frank: I think you ought to mark off what you show to the jury.

Mr. Behrens: Your Honor, this is just page 87 which I would like them to see.

The Court: All right.

Q. Captain, for the moment let us devote our attention to the No. 3 lower hold of a Victory ship. Are you familiar with Victory ships? I assume you are.

A. I am.

Q. Now, referring to that hold let us assume in the one case that you used the chine or nesting system, and in another case you were to floor off each tier. Which in your opinion would be the better one from the standpoint of safety?

A. The chine or the nesting method.

[fol. 213] Q. Would you tell the jury why?

A. For this reason, that in the nesting method each roll, as the word tells you, is nested between two other rolls and can't move; whereas, under this flooring off method, every roll in the discharge operation would be a potential roller, so to speak, and it would represent a great hazard to anyone working down there.

Mr. Behrens: You may inquire, Mr. Frank.

Cross-examination.

By Mr. Frank:

Q. I am sorry. Is it Rosengren?

A. Rosengren.

Q. Thank you. How old are you?

A. I am near 33, 32.

Q. And you are with the Moore-McCormack Lines?

A. That is correct.

Q. How many years have you been a master?

A. I was a master for two and a half years.

Q. Does Moore-McCormack carry pulp?

A. Yes, sir.

Q. Newsprint or pulp? We have been talking about——

A. Extensively newsprint but some roll pulp.

Q. How do you distinguish between newsprint and pulp; is there a distinction?

A. Well, there is a distinction, naturally, in the paper itself.

Q. That is what I mean, that is exactly what I mean. The pulp that we have been talking about, that comes from Georgetown, South Carolina. Now, you are acquainted with that pulp?

A. Not with that particular pulp, no, sir.

Q. Are you acquainted with the pulp carried by the Waterman Steamship Company vessels, or in some of their allied companies' vessels? Are you acquainted with that?

A. I don't know what you mean by being acquainted.

Q. Have you see the Waterman vessels?

A. No, sir.

Q. Have you been to Pier 6?

A. No, sir.

[fol. 214] Q. At any time?

A. No, sir.

Q. Have you ever seen the flooring off method right at Pier 6?

A. No, sir, I have not.

Q. Never did? And you contend to this jury that—let me repeat what you told this jury—that you have never seen a flooring off method; is that what you say?

A. Absolutely.

Q. Where did you look? Where did you look?

A. Let me say that I have seen vessels stowed from Canada, from the Scandinavian countries——

Q. What part of Canada?

A. From Three Rivers.

Q. Let me get this. I just want to understand your tes-

timony. Do I understand you correctly when you say you have never seen a flooring off method; is that right?

A. That is correct.

Q. Now, I want to ask you something else: How do you come into this case, by virtue of what are you here?

A. By virtue of my experience as a safety director.

Q. Safety director? And you have been a master for two and a half years?

A. Yes.

Q. Did you yourself ever sail on ships that carried pulp?

A. Yes.

Q. For whom?

A. The Moore-McCormack Lines.

Q. What type was that?

A. C-1s.

Q. Now, let me ask you this: You know that the Waterman people use their ships a great deal for the carriage of pulp, or don't you know that?

A. I am not acquainted——

Q. You don't know?

A. I am not acquainted with that.

Q. That is something new?

A. I assume that they do.

Q. When you say you have never seen it, do you mean you have never seen it up to today or you saw it at certain times?

A. I have never seen the flooring off method.

Q. You mean exactly that; is that right?

A. That is right.

[fol. 215] Q. Well, would you be surprised if you were told that at the Waterman pier, at Pier 6, they time and again use the flooring off system; would that surprise you if I told you that?

A. It certainly would.

Q. It would? Will you stay around here and find out——

Mr. Behrens: I object to that question.

Mr. Frank: I thought he wanted to be surprised.

If you will stay around here you will find out something.

Q. Let me ask you something else. Would you help me with this because I think we ought to find out what this man knows.

(At this point the wooden model, marked Plaintiff's Exhibit 2, was used for illustrative purposes.)

Mr. Frank: May I come over there, your Honor?

The Court: Yes.

Q. Now, in this photograph you are in the lower hold; is that right?

A. I assume that you are. May I take a look?

Q. Supposing you do.

A. I would say that is the lower hold.

Q. The lower hold?

A. Yes.

Q. How many layers have you got in the lower hold at this stage—just look at it.

A. I am not able to see more than one here.

Q. There is nothing about the chine method illustrated here, is there, on this photograph?

A. There is one tier.

Q. So there is.

A. That is as far as I can see.

Q. As far as you can see?

A. There may be rolls beneath those.

[fol. 216] Q. Let us see. Supposing you examine this carefully. Just look at this photograph carefully, will you? This is the only one we are talking about. That is the only one that my good friend has shown the jury. Let us talk about this one now. Look at it carefully.

Mr. Behrens: I object to that. I didn't show that to the jury. The witness selected it out of a book.

The Court: Continue.

A. It appears in this photograph that in both the forward and after corners, as they may be, there are rolls nested starting at the second tier.

Q. Let me see. Well, do you know whether it is a fact that those rolls have only been brought down for the purpose of stowing away; could you tell that by looking at it?

A. What do you mean by being brought down?

Q. Just being brought down, they haven't been stowed yet. Could you tell by the picture itself whether they have been placed there for the purpose of stowage?

A. If they were just brought down for the purpose of stowage they would be in the square of the hatch.

Q. Is it possible that they have been stuck over in that corner there temporarily, is that possible? You know those things happen in the stowage of cargo?

A. From my experience I would say that they had been stowed.

Q. Let me ask you this: You are now in the square of the hatch (indicating)?

A. That man is standing somewhere in that vicinity.

Q. Look at that photograph. From what you tell us that is a photograph of the lower hold with cargo stowed right in the square of the hatch; isn't that what the photograph shows?

A. That is correct.

Q. Let me ask you this at this time——

[fol. 217] Mr. Frank: Mr. Fischer, would you stand up, please?

(At this point a gentleman stood up in the courtroom.)

Mr. Frank: Do you know this young man?

The Witness: I have met Mr. Fischer.

Mr. Frank: Where?

The Witness: This morning.

Mr. Frank: Where did you meet him?

The Witness: In this courtroom.

Q. Mr. Rosengren, who brought you in here? I know you have been brought by virtue of your safety experience, but who brought you here? I mean who contacted you. That is what I would like to know?

A. Mr. Hageman contacted me.

Mr. Behrens: Mr. Hageman is here in court.

Mr. Frank: I know him. He is an awfully nice guy.

Mr. Hageman: Thank you, sir.

Q. Let us go a little ahead. Who recommended you to Mr. Hageman?

A. Mr. Buxton, who is director of safety for the New York Shipping Association recommended me to Mr. Hageman.

Mr. Schwartz: Somebody recommended him? You are dropping your voice, Mr. Rosengren.

Mr. Frank: He said that a safety man recommended him.

Q. What was that man's position?

A. He is director of safety of the New York Shipping Association.

Q. Oh, incidentally, is the word chine, does that word appear here anywheres (indicating book)?

A. I haven't looked. I will look.

[fol. 218] Q. Well, you are acquainted with this particular book?

A. You are asking me if a word appears or a method.

Q. I am asking you the word, you used the word chine. I distinctly remember you did use it.

A. That is correct.

Q. Does the word chine appear here at all?

A. May I look? No, the word chine does not appear on it.

Q. All right. Let us take this away for a moment. Let me ask you this: No matter what method you use, when you start in you first put the dunnage underneath. We are talking now about the lower hold; do you understand? Do you use dunnage?

A. On the lower tier?

Q. Before you put your pulp in, you put dunnage underneath?

A. Yes, sir.

Q. That is shown on the photograph, or didn't you see that?

A. I don't think it is indicated in the photograph.

Q. Well, is it?

A. You wouldn't see the dunnage if you have your first tier in.

Mr. Frank: That is on page 87, isn't it?

Mr. Behrens: Yes, that is correct.

Q. Well, maybe I am wrong again, but would you look at this (indicating book)?

A. Well, I certainly cannot see any dunnage under the tiers that are already there.

Q. Excuse me a second. Let me point out something to you. Maybe my eyesight isn't too good, but what is that

in the foreground? Does that look like wood of some kind?

A. It looks like wood, but I have no idea what part of the ship that is. That is a ship I haven't been on.

Q. You haven't been on?

A. Or a type.

Q. I understand. Now, using your method of what you call the chine or nesting—is that it?

A. Nesting or chine method.

Q. Which one would you rather use?

A. I prefer you use nesting—it makes no difference.

Q. You would rather use nesting? Then I will stick to your nesting.

[fol. 219] Now, tell me this: In the first flooring off, you put them right across the ship in a forward and aft position: You can see that from where you are seated, can't you?

A. Yes, I can see it now.

Q. Well, under the system, your nesting system, you put them right across the ship in the forward and aft—am I correct?

A. Not across the whole hatch, no.

Q. You don't put them right across from wing to wing?

A. You stow them fore and aft under the wings but aburton further aft.

Q. Will you come down here and show that to the jury so that they will understand what you mean.

(At this point the witness came down to the wooden model.)

Q. Now, as I understand it, when you are under the wings you start putting them in fore and aft and clear that portion where it is under the wings?

A. Yes, sir.

Q. Further aft you put them aburton; is that right?

A. That is right.

Q. And when you say aburton you mean you put them the other way?

A. Athwartship.

Q. Athwartships, this way, in other words (indicating on model)?

A. That is right.

Q. That is only the aft, and in the forward, under the wings; is that correct?

A. That is correct.

Q. But in the square, all the way across, from port to starboard, you put them in fore and aft; is that right?

A. You may. You should have them in the wing fore and aft, you may go either way in the square.

Q. It looks on this photograph that they are fore and aft; is that right?

A. That is correct.

Q. Now, on your system, then, you build it up by putting in the trough, between two rolls, one of these rolls, is that the idea?

A. That is correct.

[fol. 220] Q. Belly to belly, isn't that what they call it in longshoremen's language?

A. There are probably a dozen names which will cover it.

Q. All right, let us go ahead now. I want you to assume that there were three layers, in other words, what you call your nesting system, that there were three floors without any planks between them: Do you understand what I mean?

A. Yes.

Q. Particularly under the wings: Do you follow me?

A. I follow.

Q. If you don't, please tell me so; nobody is trying to confuse you. Let me get this picture. You start in unloading by—let us go to the lower hold without bothering between decks now.

A. Yes.

Q. Do you follow me?

A. Yes.

Q. The longshoremen, experienced in this type of work, they start taking off the top rolls; is that right?

A. That is correct.

Q. With hooks, whateyer they do—do you use a sling or hook?

A. Either, there are half a dozen pieces of equipment which can do the job.

Q. When you have newsprint, you have a sling so that you don't harm the newsprint, is that right?

A. We don't use slings.

Q. You use clamps?

A. We use clamps, that is a method.

Q. O. K. One is as good as the other, I assume; is that right?

A. From the standpoint of safety, I believe it is.

Q. And as you are unloading it, you are keeping it as level as possible, as you are going down?

A. Yes.

Q. Right across. You would strive to keep it as level as you can.

In other words—well, finally what you do is you clear the square of the hatch at one time or another; is that right?

A. That is right.

[fol. 221] Q. While the wings are still loaded with these nesting or chine type of piles; is that right?

A. Correct.

Q. Now, I take it the proper practice so far as the winches are concerned, you don't bring your hooks right down underneath there because there is danger of breaking the cargo or damaging the cargo: Am I right?

A. That is correct.

Q. You agree with that?

A. Yes.

Q. You may on the other hand, as was testified by some of the men, when you got down below you may take a roll off the top that is close to the coaming without danger; is that right?

A. Yes, I would say that is a matter of judgment at that point.

Q. One stevedore would do one thing and another another?

A. Yes.

Q. But you agree with me, do you not, you don't pull your clamps underneath and drag them out from the top rolls?

A. No, you don't.

Q. That is dangerous; is that right?

A. Yes.

Q. All right. I want you to assume at this stage you have cleared the square of the hatch so that you can start

taking out underneath the wings: that is the proper method, isn't it?

A. That is correct.

Q. Do you understand?

A. Yes, I follow you.

Q. Now, I want you to assume that there are four rolls at that time left under the wings, on the bottom, the way I have them here (indicating).

A. Just the way they are?

Q. Yes. And on top of that, you have two or three more, and further back either one or two toward the skin of the ship; is that right?

A. Yes.

Q. You have cleared the square of the hatch. Now, how do you protect this from rolling (indicating)? Have you got anything to protect these (indicating)?

A. You would either wedge or throw a piece of dunnage in there to hold it.

[fol. 222] Q. What is the customary? A wedge?

A. A wedge is preferable.

Q. Preferable?

A. Yes.

Q. Now, the second mate drew a picture of this (indicating). Is that your idea of a wedge that is used?

A. Yes, that approximates it.

Q. What is the purpose of having that wedge there? I don't get it.

A. To hold these rolls back (indicating).

Q. To hold them back?

A. To hold them back in stow until you are ready to work them.

Q. Now, I want you to assume that the square is all cleared, that now these men are going to take them out of the wings: How is that done?

A. You want me to show you?

Q. I wish you would. Can I help you? I will hold them until you are ready.

You say you have wedges. Now what do you do next?

A. You would temporarily release the wedge with some sort of a pry or something.

Q. A wooden bar, you sort of ease it off?

A. You would ease them down, and you would, at the same time, you would throw a wedge into the one just immediately outside of that, or in this case inside.

Q. Inside?

A. Yes.

Mr. Schwartz: Will you say, so that the record may be clear, that when you say inside you mean toward the skin of the ship, that is for the purpose of this demonstration.

Q. What you say is that these men, these stevedores are supplied with bars?

A. Yes.

Q. And when they get ready to go underneath the wings, they ease off with the bar. Would you follow my finger down, I am using this as a bar. You start to ease off; is that right?

A. Correct.

[fol. 223] Q. And then when you do that the top layers fall into place; is that the idea?

A. The top falls to the bottom.

Q. To the bottom?

A. Yes.

Q. And of course, it is essential, isn't it, that these men have got to look out in case these rolls start to get away from them; is that right?

A. Yes, I would advise them.

Q. Would you say in unloading this—well, from your experience have you had quite a number, quite a number of accidents of men being struck by rolls?

A. No, not being struck by rolls.

Q. Or being hit by rolls, not stepping out fast enough when the rolls start coming down.

A. No; I don't have my accident frequency figures with me, but I would say——

Q. Did you have some?

A. A very small frequency.

Q. Now, I want to ask you this; I want you to assume that you are working, you are unloading onto the dock, and in order not to confuse port and starboard, these longshoremen today use—you have heard the words—inshore and offshore. Now, they are unloading inshore, the

entire ship is unloading, and all the booms are outboard or aburton over the dock: Do you know what I mean?

A. The whole ship is unloading to inshore?

Q. Is there inclined to be a little list in that direction?

A. There is inclined to be a little list—I put emphasis on the word little.

Q. All right. When these rolls get started from offshore, they can get away from the men, can't they?

A. Not if they are being handled properly.

Q. I say, if they get away from them they can attain a lot of momentum and velocity.

A. I should think so. They are pretty heavy.

Q. Now I want to ask you this: Now, the wedge is an important thing to keep underneath the bottom roll, is it not?

A. It is important to prevent the rest of the pile from dropping.

[fol. 224] Q. In other words, when they do break them down, isn't that what they call it, breaking down a pile; is that the word used?

A. That is the expression.

Q. It is a fact, isn't it, that the wedge becomes—I am illustrating on this diagram—becomes an important factor; am I right?

A. That is correct. May I ask a question?

Q. I would rather not.

A. So I am not confused.

Q. That I don't want.

A. Which wedge are you talking about?

Q. I am talking about the wedge——

A. Which wedge? The wedge as is shown after the roll is dropped or before?

Q. No, no, before. It is wedged in there now; right?

A. Yes.

Q. With this type of a wedge, and this is not a very artistic one but it will do for illustrative purposes (indicating). Now, tell me this: When you have, as often happens, a double gang working—you know what we mean by a double gang?

A. Yes, sir.

Q. That means a forward gang and an after gang, the

forward gang works as a unit and the after gang works as a unit; is that right?

A. That is correct.

Q. Now, when you disturb a pile in the forward part, depending upon the stowage, does it tend to interfere with the other pile; is that possible?

A. With the pile worked by the other gang?

Q. Not as yet worked—in other words, I want you to assume, my friend, that your forward gang is working at a pile, breaking it down in the manner I have indicated and which you agree with me, easing it down; now, is there a tendency of the same interfering with the roll immediately aft of it two rolls away: Could that happen?

A. I think that it might affect the roll immediately adjacent to it, but I don't see any possibility of it affecting rolls further away than that.

[fol. 225] Q. Well, were you told what the claim of the plaintiff was in this case before you went on the witness stand?

A. I am not thoroughly conversant with this.

Q. Were you told anything about a roll while the forward gang was breaking down——

A. I understand it hit a longshoreman.

Q. It hit a longshoreman.

A. Yes.

Q. I want to ask you this: While the men are breaking down, sometimes—I am talking about sometimes—a roll from the top may hit the deck with a little more force than others; that happens, doesn't it?

A. Yes, that depends upon the individual judgment used in dropping the roll.

Q. You mean that the men who are breaking down at that forward part, if one man happens to do it a little differently; the roll may hit the deck; is that right? It may hit the deck with a little more force than it would occur ordinarily; is that what you mean?

A. The fact he releases the key roll, the faster the second roll will drop.

Q. Right, that is why you need the wedges there, to hold them as you are easing off. I say the wedge holding——

A. I don't follow you now. That is why I asked you that question before.

Q. I am talking about the wedge now. You have told us before you have got the wedge underneath here and you are easing off; is that right?

A. You can't ease off with a wedge there, the wedge won't allow the roll to move.

Q. Isn't that the idea of it, to keep the wedge under there, and you just ease away with the wedge; isn't that the way you have seen it?

A. Are you talking now about a pry?

Q. No. The pry is for prying it open, the wedge is holding it until the top two rolls or three rolls level off or come down to the bottom. Haven't you seen that type of work?

A. No, I haven't. I don't think the wedge will allow it to move.

[fol. 226] Q. You don't think so?

A. It would go against all the better practice——

Mr. Schwartz: You are cutting off his answer. Let us get his answer.

A.——all the better practice of handling newspulp or newsprint.

Q. Well, let me see, let me get it this way: You would kick the wedge out?

A. No, I didn't say that. I said earlier in answering your questions that I would remove the wedge simultaneously or shortly after I had taken up the pressure with the pry.

Q. Wait a minute. You pry it and at the same time somebody takes off the wedges, is that the way you take it, you remove it entirely?

A. Remove the wedge?

Q. Yes.

A. Yes, I would remove the wedge.

Q. Entirely?

A. Absolutely. How else could you——

Q. Let me ask you this——

Mr. Schwartz: You haven't heard his answer.

Your Honor, the witness is entitled to answer the question.

A. It is not conceivable to me that the roll would move if the wedge were still there; it would offer too much resistance.

Q. All right. Let us see now. You take out the wedge; right? You take out the wedge?

A. Right.

Q. Is that the idea?

A. That is correct.

Q. When you take out the wedge, what is there preventing the roll starting to move before you want them to?

A. You are holding it with a pry.

Q. You are holding it with pries? Where do you put your pries?

A. Underneath the rolls, you can hold it there.

[fol. 227] Q. So one man is holding it with the bar, with the pry underneath the roll; is that the idea?

A. I would advise two men to do that.

Q. Two men? And who is easing it off, who is easing it off or breaking it down? You need another man there.

A. May we build this up again (indicating wooden model)?

Q. Yes.

Mr. Frank: Your Honor, do you think that we are getting beyond our time?

The Court: Let us finish with this witness.

Q. Will you go ahead now.

A. This one is originally——

Q. You are pointing to the bottom layer; is that right? We have to get this on the record.

Mr. Behrens: May I make a suggestion, your Honor? Why don't we get the witness up there? I don't think he needs to be hidden behind the model. I am sure I can't see it and I am sure the jurors can't.

Why not set them up there where we can all see what the witness is doing.

Mr. Frank: Will you sit down, Mr. Rosengren.

Q. Now, I want you to understand that they are all lined up, that there are a number of piles of that pulp. Now, you say you started off—well, when they clear the square

of the hatch you start off with wedges how many, one or two?

A. I would say one is sufficient.

Q. All right. Now it is holding.

You say you have sometimes one and sometimes two, is that the idea?

A. Yes.

Q. Now, the men use a bar, and we have used this (indicating)?

A. Yes.

Q. They pry it open; is that right?

A. Yes, sir.

Q. Now, you say first you are going to take two men to remove the wedge; is that what you said?

[fol. 228] A. No. I said that you have a wedge here or two wedges, as the case may be.

Q. Yes?

A. And before you remove the wedges you would hold this back with your pries. You would then kick out of the way your wedges or discard them, and then you would back off with your pries and drop this roll (indicating), this roll (indicating), this one being wedged so that it will not be removed (indicatng).

Q. Which one is wedged now, the one next to the——

A. This one (indicating), you would wedge this.

Q. After you removed the wedge here, what do you do with this roll (indicating)?

A. You back it off.

Q. You get it away?

A. Yes.

Q. And then you put a wedge over here (indicating)?

A. No—one end of this roll is free, I assume.

Q. Yes?

A. Because you have already told me, I think that——

Q. You are going right.

A. ——that they go all the way from fore to aft.

Q. Well, the testimony is that there were four or five in a row from fore and aft.

A. That wouldn't consume the entire hatch.

Q. Well, we are talking about something that as a mat-

ter of fact we shall be able to account for, but you can't go over there with piles alongside of you.

Mr. Behrens: I will object to that on the ground that the testimony from your witnesses is that the pile right along the side of the ones these men worked had been worked further back, so that there was something open or hanging over.

Mr. Frank: I am afraid that your recollection is not very good because——

The Court: The jury will decide.

Mr. Frank: I think they will remember there were four, or one of them said it was the fourth pile over.

[fol. 229] Q. Now, I don't understand this, Mr. Rosengren; in order for you to wedge the next one, you first have allowed the one, this one (indicating) to drop; isn't that what you said?

A. That is right, automatically. This one should hold this one (indicating), while this one (indicating) is dropping. It is preferable, in my mind, to wedge this one (indicating), if you can. If the tiers are adjacent to each other on either side, naturally, you can't do that.

Q. But under any circumstances, you agree, do you not, that wedging is important throughout the entire operation; is that right?

A. I agree that it is important where it is necessary, yes.

Q. Under the chine system; is that right?

A. Yes.

Q. Now, you say you have never seen the flooring off system, so I cannot ask you anything about how it is discharged, can I?

A. No, sir, I couldn't give you anything.

Q. Let me ask you: You are a safety man, you say. Well, could you understand that where you have a flooring system and planks there you have no problem, you get your hooks down in the square of the hatch and you drop the clamps down and you take them out and then the others come up against it and you take another one out; have you ever seen that?

A. No, sir.

Q. You never did?

A. No, sir.

Q. There is one thing I don't understand. You are testifying here for, well, a sister company or may I——

Mr. Behrens: I will object to that.

Mr. Frank: Let me finish.

Well, I will continue.

Q. Do you know where the Waterman pier is?

A. I have never been there.

Q. Pier 6.

A. I know where it is, yes.

[fol. 230] Q. But you have never been over there to watch them use the flooring off system in discharging?

A. No, I haven't.

Q. Well let me ask you this: Under the flooring off system the planks, those planks—well, is that a little slower system, would you say, or faster?

A. The discharging method?

Q. In discharging.

A. It would be very hard for me to say because I have never made the comparison.

Q. Because you don't know.

Mr. Frank: I see. Just a second. I think I will probably have very little more.

Q. Let me ask you this: Have you ever had anything to do with cartons of citrus fruit in cargo?

A. Cartons?

Q. Cartons.

A. Yes.

Q. Where you have——

A. Crates, do you mean?

Q. Crates? No, cartons.

A. No, I haven't, no.

Q. Well, what is the difference?

A. A crate is open at——

Q. Oh, that is an open thing. Well, I don't mean that. I mean citrus fruit cans, cans of citrus fruit, cartons of citrus fruit cans.

A. Oh, yes.

Q. Now, is it proper stowage to put that on the bottom and then put on 465 tons of plup——

Mr. Schwartz: I object to that, your Honor. There is no testimony in this case as to that at all. Mr. Frank, in his opening, said he didn't know, that he didn't have any evidence. Now, the stowage plan doesn't show that, that is, if Mr. Frank reads it properly. There is no proof no place that where the cargo was placed there was any such cargo as——

Mr. Frank: If your Honor pleases, I am talking about hatch No. 3, and this is an exhibit in evidence. This plan indicates that there were such——

[fol. 231] Mr. Behrens: You see, your Honor, I don't care to read Mr. Schwartz's mind, but in his opening Mr. Frank said that he didn't know whether this stowage plan meant that all across the floor of No. 3 lower hold this canned citrus was there or whether it was all in the forward part or all in the aft part because he cannot tell whether this stowage plan means that or not. Now, nothing has been said further about the matter. Therefore, how can he assume there was such a stow here, when in fact there is no evidence of that stow?

The Court: Has there been a witness that testified to what the actual stowage was?

Mr. Behrens: No, your Honor.

Mr. Frank: No, your Honor.

The Court: Then I will sustain the objection.

Mr. Frank: Let me just state my position. This is a cargo plan that was furnished me by them. I have offered it in evidence. That shows a certain thing.

Now, may I ask at this time, I don't want to argue with the Court, may I ask at this time whether that is good or bad stowage.

Mr. Behrens: We don't see that that is here in this case.

The Court: What has that to do with it?

Mr. Frank: It is according to the plan itself.

Mr. Schwartz: It all depends upon the way you read it, Mr. Frank.

Mr. Frank: All I can do is use what they furnish me.

The Court: What I think the jury is interested in is the question of safe stowage.

Mr. Frank: I see your Honor's point. Now, I don't mean [fol. 232] that it has something to do with the accident,

but I want to know whether the stability of the paper is affected thereby, that is the point.

The Court: As I recall it, and it is for the jury to determine, as I recall it, there were no wedges, it was dunnage.

Mr. Frank: That is right.

The Court: That acted as a part of wedging; isn't that right?

Mr. Frank: That is right, your Honor.

The Court: All right, then, go ahead.

Mr. Frank: That is all I have.

Mr. Schwartz: I may want to ask him a few questions, your Honor, but I don't know whether you want me to do that at this stage.

The Court: We might as well finish with this witness.

By Mr. Schwartz:

Q. Captain Rosengren, did I understand you to say that you have been safety engineer for the Moore-McCormack Lines for approximately two years?

A. No, I said—let me break this down. I was assistant safety director from 1947 to 1949, at which time I was promoted to director of safety and have been ever since.

Q. Overall, how many years have you served Moore-McCormack as a safety director, whether it was assistant or the actual head?

A. Six years.

Q. And during that time, is it your testimony, that you have seen paper pulp come into whatever Moore-McCormack pier it was approximately every ten days?

A. No, I said that I had seen cylindrical cargo in the form of newsprint and paper pulp, and I said extensively newsprint.

Q. Every ten days?

A. Yes.

Q. And that has been over this entire period while you have been a safety director, either assistant or super-
[fol. 233] visor?

A. That is right, except for short leaves of absences.

Q. And you have seen this chine method or nesting method on all of those cylindrical objects?

A. I have seen it.

Q. What pier does Moore-McCormack have that you are stationed at, that is, if you are stationed at pier?

A. I happen to be stationed at Pier 32, but we have also Piers 15 and 16. Shortly back from 1948, we had the 31st Street pier, we had Pier 46 on the North River.

Q. Is it your job to go to all piers that Moore-McCormack has vessels discharging and to see the operation?

A. That is correct, not only in this city but other cities.

Q. You jump around from one vessel to another, wherever she may be, or whatever pier?

A. That is right.

Q. And during the course of your duties as a safety director, either assistant or otherwise, have you seen cargo pulp being discharged?

A. I have.

Q. And cylindrical objects?

A. Yes, sir.

Mr. Schwartz: That is all.

The Court: And you have always used wedges?

The Witness: We have used wedges where we have felt they were necessary.

The Court: Have you ever seen dunnage used?

The Witness: I have, sir.

The Court: Just scraps?

The Witness: Short pieces of dunnage used as a temporary wedge, yes, sir.

The Court: All right. You are all through now?

Mr. Schwartz: That is all I have.

The Court: That is all. Thank you very much. It is now a quarter past 1; we will take a recess until half past 2.

(Recess taken until 2:30 o'clock P. M.)

[fol. 234] Afternoon session.

The Court: I am informed that the next witness cannot be here until Monday morning. Therefore we will take a recess until that time.

It has been my custom, and I think it is a good one, to always warn the jury about getting a slant in the mean-

time from friends. Don't talk about this case to your friends, and don't let any of them talk to you. Just keep your minds absolutely clear until the case is submitted to you, and you have heard the summations of the lawyers and you get the charge on the law from the Court. Then you are free to decide according to your consciences.

Consequently with this admonition I excuse you, with the thanks of the Court, until Monday morning.

(Adjourned to Monday, February 9, 1953, at 10:30 o'clock A. M.)

February 9, 1953.

Trial continued.

The Court: We have lost one juror, so the first alternate will take his place.

(The first alternate juror took the place of No. 2 regular juror.)

[fol. 235] Don Miller Fisher, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Behrens:

Q. Captain Fisher, you are a mariner by occupation, are you?

A. Yes, sir.

Q. In the month of July, 1949, were you the second mate or second officer on board the Canton Victory?

A. I was.

Q. Were you in the No. 3 hold aboard that vessel at the time when Mr. Palazzolo was injured?

A. I was.

Q. At that time, namely, July, 1949, were you duly licensed as a second officer by the United States Coast Guard?

A. I was.

Q. Since that time have you received your Master's papers from the United States Coast Guard?

A. I have.

Q. How long ago was that, sir?

A. It was about a year ago, last September.

Q. At the present time you are duly licensed as a Master of ocean-going vessels, is that correct?

A. That is correct.

Q. With reference to the Canton Victory, about how long previous to July, 1949, had you served aboard that vessel as her second officer?

A. Approximately a year.

Q. About a year?

A. About a year.

Q. During that year, Captain, was that vessel engaged in one particular trade?

A. Yes, it was.

Q. Will you describe for the Court and jury the trade in which the vessel was engaged, telling us where she went, and generally what ports she went to.

A. We proceeded from the Atlantic East Coast ports to the Gulf ports, that is Boston, New York, Philadelphia, Jacksonville, Florida, New Orleans, Mobile, Tampa, and Georgetown, South Carolina, back to Boston. Occasionally one of these ports might be alternated with another port, [fol. 236] depending upon the cargo we had either to load or discharge there.

Q. Taking a tour of those ports, about how long was a turn around? Take the port of New York, for instance, while you were engaged in this trade how often would your vessel be here?

A. It varied. For a while we were on a three-week schedule, then we were on a two-week schedule; that is every two weeks we would make a complete round trip.

Q. During that period was it usual for you to stop at Georgetown, South Carolina?

A. Yes.

Q. What was the nature of the cargo that you listed at Georgetown, South Carolina?

A. It is what is called pulp board, that is large rolls of pulp usd to make corrugated paper, paper bags, various commodities.

Q. On each of these trips when you stopped at Georgetown did you pick up any cargo other than rolls of paper pulp?

A. Only paper.

Q. That would be exclusive cargo that you picked up at Georgetown?

A. At Georgetown.

Q. Who was the stevedore for the vessel at Georgetown during that year previous to the day of the accident?

A. Mr. E. G. Rice.

Q. For whom did Mr. Rice work?

A. Ryan Stevedoring, Inc..

Q. Would you describe generally the nature of the work which Ryan did aboard your vessel at Georgetown when you stopped by there for pulp?

A. The stevedore was in charge of hiring the men, his gangs and supervising the work in detail aboard the vessel in loading this cargo, however to the general satisfaction of the mate in charge of the vessel, the master, and the chief officer and his under officers. I guess that about covers it.

Mr. Schwartz: Captain Fisher, will you please keep your voice up a little bit?

The Witness: All right.

[fol. 237] Q. With reference to the stowage of cargo at Georgetown, what if anything did your crew have to do with that?

A. The crew does not have anything to do with the loading or discharging of cargo. These men are engaged by the shore, our longshoremen, what are called longshoremen hired by the stevedores.

Q. Throughout the year when you stopped by Georgetown every two weeks or so did you see the same longshoremen on many occasions, the same individuals?

A. Yes. Oh, yes.

Q. In discharging here in the port of New York during that year did you see many of the same longshoremen every two weeks working aboard your vessel?

A. Yes.

Q. Do you recall when the cargo of pulp was loaded at Georgetown which was discharged at New York begining on July 20, 1949?

A. I would have to refresh my recollection if I can by referring to a copy of the logbook.

Mr. Behrsen: I wonder if I might ask this, which is the chief officer's logbook, marked for identification.

(Marked Defendants' Exhibit C for identification.)

Q. Would you look at Defendants' Exhibit C for identification and tell me whether that is the smooth log of the vessel covering the loading of this pulp and the discharge in Brooklyn?

A. Yes, it is the smooth log.

Q. Would you explain generally what the chief officer's log is, what it contains, Captain Fisher, please?

A. The chief officer's logbook contains a record of the officer's account of all activities aboard the vessel, any important circumstances and things that come up in connection with the loading of the cargo, when the gangs started work, when they finished discharging, the weather, and it also covers the sailing time, the drafts, any detention [fol. 238] caused by rain or broken gear or anything of that nature. It is a general overall picture of all details aboard the vessel, kept by the chief officer.

Q. Is the log aboard the vessel kept watch by watch?

A. Yes, it is.

Q. What do you mean by watch by watch, Captain?

A. There is namely three watches on the ship. Vessels that carry say four licensed officers, you have a third officer, your second officer, and your fourth officer, when they carry four, and the chief officer. The first officer, the chief officer does not stand a watch, but the second officer on every vessel is assigned the 4 to 8 watch. That is, from 4 in the morning until 8 in the morning, and from 4 in the afternoon until 8 in the evening. The fourth officer is from 8 in the evening until 12 at midnight, and from 8 in the morning until 12 noon. The third officer stands from 12 to 4 A. M. and P. M.

Q. Now, is it the custom and practice of each of the officers that you have named to make an entry in the logbook at the beginning and the end of each of their watches?

A. Yes, at the end of each watch he makes his entries in the logbook concerning the work that is going on, whether it be on the bridge where he is in charge of the watch on the bridge, or whether it be work in connection with the

working of cargo. He makes the entries, showing the times that the gangs started to work, when lines were checked, and various routine entries in connection with his business in the watch of the vessel.

Q. When a vessel is in port, we will say tied up to a pier, do the officers stand the same watch as you have just described?

A. Yes, they do, with the exception of sometimes maybe an additional officer will be assigned by the chief mate on his watch below to assist him in any special type of cargo, say a cargo of whiskey or alcoholic beverages, or jewelry or any special cargo. In that case the chief officer may, what we call, break out one of the other officers not on watch to [fol. 239] assist him below, with the officer on deck in the handling or watching of that particular cargo.

Q. Can you tell us by refreshing your recollection from the log the date when the cargo of pulp which was discharged at New York on July 20th was loaded at Georgetown?

A. The log shows on July 15th the vessel arrived at 0734 in the morning, and started work at 8 A. M. on the 15th.

Q. That is on the 15th of July, 1949?

A. Yes.

Q. You say that the work of stowing the cargo was started at Georgetown at about 8 o'clock in the morning, is that correct?

A. 8 A. M., yes.

Q. How long did the stowage of cargo at Georgetown continue after 8 o'clock in the morning on July 15th?

A. It continued until noontime, and then they were knocked off for lunch until 1300, that is 1 P. M., at which time they resumed loading Nos. 1, 2, 3, 4 and 5 hatches.

Q. How long did the loading continue after 1 P. M. in the afternoon of that day?

A. Until 11:25 P. M. just a minute, excuse me. No, we continued right on through, what we call working around the clock, working right on past midnight with these gangs, and finished up on July 16th, at 4 A. M. in the morning.

Q. As I understand it, Captain, the stevedores came aboard and began working the vessel at Georgetown at about 8 o'clock in the morning of the 15th; is that correct?

A. That is right.

Q. And you continued working aboard your vessel until 4 o'clock the following morning; is that correct?

A. That is correct, yes, sir.

Q. When did the vessel sail, sir?

A. The vessel sailed at .0929, that is 9:29 A. M. on July 16th.

Q. Where did the vessel go from there, Captain?

A. The vessel proceeded from Georgetown to Boston, I believe. (Inspecting book.) That is correct.

[fol. 240] Q. When did she arrive here in New York at Pier 6, Bush Terminal?

A. On July 20th, at .0606 in the morning, that is the New York arrival, and finished with the engines at 7:45.

Q. Would you stop for a minute, sir? What does the notation "finished with engines" mean?

A. That means that the vessel is all secured and tied up to the pier, and we rang off on the engine room telegraph. There is a little mark there which shows also in the engine room, and it is marked F. W. E., that means finished with engines. That means we have the vessel secured made fast to the dock or pier, and we won't need the engines any further until later notice.

Q. You have your gangway out and lines all secure?

A. Yes.

Q. That was about a quarter to 8 in the morning of July 20th?

A. That is right, that was quarter to 8, 7:45 A. M.

Q. At what hour did the Ryan Steyedoring Company come aboard on the morning of July 20th to begin discharging cargo?

A. 8 A. M.

Q. To go back to the working at Georgetown, you have told us that they worked around the clock, as you call it, until 4 o'clock of the morning of the 16th. Which hatches were they working at Georgetown?

A. The logbook shows that they were working all hatches, Nos. 1, 2, 3, 4, and 5.

Q. You had five hatches on board those victory ships?

A. Yes.

Q. That is five openings in the main deck and compartments underneath, is that correct?

A. That is right.

Q. While they were working at Georgetown all of those hatches were being worked, is that correct?

A. That is correct.

Q. I believe a little bit before you referred to three or four mate shifts. How many mates were there on the Canton [fol. 241] Victory in the month of July, 1949?

A. Four mates.

Q. Who were those four mates? I do not mean for you to give us their names. I just mean their designations, chief mate and so forth.

A. The first officer, second officer, third officer and fourth officer.

Q. How was the number ascertained, Captain, how was it that you had four mates on there rather than six or nine or two? How did that number come about?

A. Well, years ago they only carried three mates; and I suppose—I cannot answer that exactly.

Q. Who fixes the complement of an ocean-going vessel?

A. Well the United States Coast Guard does.

Q. Let me ask you one other question about that: In view of the fact that you worked until 4 in the morning, was it permissible for a mate who worked around the clock on the vessel up to the hour of sailing, to then go to the bridge?

A. No.

Q. How long must he be off before he is permitted to handle the navigation of the vessel on sailing?

A. Six hours.

Mr. Behrens: Your Honor, I pointed out to Mr. Frank that I had one expert witness who had not arrived when we opened court this morning.

The Court: Is he here now?

Mr. Behrens: He is here now, and I would ask your Honor's permission to put him on so that he may return to his employment. I understand Mr. Frank has no objection.

The Court: There is no objection to that. We will suspend with this witness temporarily.

(Witness excused temporarily.)

[fol. 242] CHARLES SAUBIER, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Behrens:

Q. Commander, would you state your present employment for the Court and jury?

A. I am employed in the United States Merchant Marine Academy.

Q. Is that at Kings Point?

A. At Kings Point.

Q. What is the nature of your employment there, sir?

A. I am attached to the Department of Nautical Science, where there is a second on cargo handling and stowage, and I am the Section Chief.

Q. You instruct on that subject of cargo handling and stowage?

A. Yes, sir.

Q. How long have you held your present position at Kings Point?

A. I was attached there in 1947, July.

Q. Have you been there continously since?

A. Since then.

Q. Has the nature of your duties generally remained the same while you have been there?

A. Since I have been here, yes.

Q. Would you describe your general experience at sea for the benefit of his Honor and the jury?

A. I have been going to sea since 1931, from 1931 to 1934 as a cadet-midshipman in the California Maritime Academy, graduated in 1934, and I spent one year on tankers. In 1935 I left tankers and went with the Matson Navigation Company. I stayed there until 1942, the outbreak of the war, at which time I went into the Navy. In 1942, I was attached to Treasure Island, until the latter part of 1942, when I was transferred to San Mateo, California, where during the war they had a major training organization, a part of the same organization where I am now employed. And as a naval officer I was transferred there in the latter part of

[fol. 243] 1949. Then in 1942 I was transferred out of the training program into the position of Port Director at Tsing Tao, China, and I was at Tsing Tao, China until 1946, when I was separated from the Navy. And then I came to San Mateo again as head of the Department of Nautical Science, and in 1947 I was transferred here and I have been here since that time.

Q. With reference to the school of nautical science at San Mateo, is that where you said it was?

A. San Mateo.

Q. Were you also in charge of instruction there as to stowage of cargo?

A. I didn't teach that subject; I was head of the department in which it was taught officially. That was a school for one year, sort of a freshman course.

Q. In this case, Commander, we have been discussing the stowage of a cargo of pulp, rolls of pulp in the No. 3 lower hold of a Victory ship. The pulp has been described here as of practically uniform diameter of about four feet; lengths of the rolls varied, it is said that some were four or five feet long and some up to six feet long.

Are you familiar generally with the nature of what I and discussing now?

A. Yes.

Q. Before I forget it, do you recognize this book?

A. Yes, it is a standard text we use, it is Leemings standard text that we used for the course at our school.

Q. In other words, in instructing future merchant marine officers, this book that I have just handed you is a textbook which is used, is that not so?

A. Yes.

Q. What is the name of this book, Commander?

A. Leemings, Maritime Stowage by Leemings.

Q. Put out by the Department of Commerce, is it not?

A. Yes, in 1940 I think it was.

Q. If you will look at the part of the book, sir, where I have marked it off you see that photograph to which I have referred?

A. Yes.

[fol. 244] Q. Is that photograph typical of the stowage of cylindrical objects fore and aft aboard a vessel?

A. Cylindrical objects generally?

Q. Such as rolls of pulp or newsprint, things of that type?

A. Yes.

Mr. Behrens: I would like to offer this page of the book in evidence. Mr. Frank has already seen it. This is page 379.

The Court: There is no objection, Mr. Frank?

Mr. Frank: No.

The Court: It may be marked.

(Page 379 of book marked Defendants' Exhibit D in evidence.)

Mr. Behrens: I would like to show it to the jury at this time, just that page of course, your Honor.

The Court: Surely.

Mr. Behrens: Containing the photograph to which the commander has referred.

(Defendants' Exhibit D passed around to the jurors.)

Q. Commander, with reference to the photograph which has just been marked in evidence, in what word or words would you describe the stow which we see there?

A. Describe it?

Q. Yes. What would you call that method of stowing?

A. Well, I have heard it referred to in two different ways. In my own personal experience we refer to that as bilge and cantling, because it is a somewhat similar nature to the stowage of barrels. Also I note from the textbooks it is called the chine method.

Q. The chine method, is it also referred to as the nesting method?

A. Well, I think the Moore-McCormack Steamship Company might have—I read some of their instructions, and I saw that somewhere. I am not sure whether that is where [fol. 245] I saw it referred to as nesting or not, but I have heard the term, but I do not know where.

Q. But the term bilge and cantling or chine in your judgment would describe the method of stowing which the jury has just seen?

A. Yes.

Q. Is it a usual or an unusual method of stowing?

A. I would say that it was a usual method.

Q. That is as far as your experience is concerned this method of stowing is the usual one, is that correct?

A. You are talking about the majority of the time?

Q. Yes.

A. Which is actually the most used in the majority of cases I couldn't actually say precisely. I have no knowledge which is used the most. I would say this is an acceptable method of stowage: This is used.

Q. In your opinion, is this a proper method of stowage?

A. Yes, it is.

Q. Are you familiar with a book called "The handling and stowage of cargo" written by Captain Alfred G. Ford of the United States Maritime Service?

A. Yes.

Q. Aare you familiar with that?

A. Yes, I am.

Q. Is that book used by your students?

A. This is a more practical treatment of the same subject that Leemings treats with, and we use it for the fourth class, what would be considered the freshman in a four-year course. We use that book there.

Q. I wonder if you would be good enough to look at the diagram, Commander, contained in Captain Ford's book opposite page 204, between pages 204 and 205, and I should like you to look at the lower hold of No. 3. Does that diagram also show the method of stowing by chining of a cargo which appears to be pape or pulp or cylinders?

A. Yes, it appears to be.

Mr. Behrens: I will offer that page in evidence, your Honor.

Mr. Frank: That is not a Government publication.

[fol. 246] Q. Oh no, no, this is not published by the United States Government, is it?

A. No, it is published by the International Text Book Corporation.

Q. And it is used in your instruction of your upper classmen concerning stowage, is that correct?

A. Fourth classmen, lower classmen, freshmen.

Q. You say that this is the more practical explanation of the theory which is exemplified in the first book you identified, is that correct?

A. Yes, the languge used is easier, I would say it treats it more from a practical basis, the fundamentals are covered.

Mr. Frank: I want to make sure that you and I see the same thing. This is the one you are talking about?

Mr. Behrens: Yes.

Mr. Frank: No objection.

(Picture between pages 204 and 205 of the book marked Defendants' Exhibit E in evidence.)

Mr. Frank: Couldn't you tear that photograph out?

Mr. Behrens: I could, but I would just as soon not destroy it.

Q. With reference to Defendants' Exhibit E in evidence, I wonder if you would put an arrow pointing out the stow to which we have just referred.

Mr. Frank: Why don't you encircle the entire thing.

Mr. Behrens: Do you want to draw a circle around it?

Mr. Frank: Around the entire stowage there.

Q. It doesn't show up too well, I think we had better put an arrow on it.

A. Yes.

Mr. Behrens: May I show this to the jury?

Mr. Frank: May I just look at it to see what is marked?

[fol. 247] Mr. Behrens: Yes, of course.

Mr. Frank (inspecting paper): All right.

(Defendants' Exhibit E passed around to the jurors.)

Q. Commander, with reference to this last exhibit which has been marked Defendants' Exhibit E, in this profile of the vessel that would indicate an athwartship stow, would it not?

A. Yes, sir, the axis of the rows are athwartship.

Q. Would it be possible in a profile to show the chine method of stow fore and aft?

A. In a cut amidships, no.

Q. In other words, that would just show up as a solid stow with small lines in it?

A. Rectangles, yes.

Mr. Behrens: You may inquire, Mr. Frank.

Cross-examination.

By Mr. Frank:

Q. Captain, as I understand it, stowage was not one of your principal objects of teaching; is that correct?

A. At the present time that is all I do.

Q. Now?

A. Primarily.

Q. You mean up at Kings Point?

A. Yes.

Q. That is for upgrading officers?

A. No, it is a four-year college level course. Gentlemen go in there at the age of 18 to 17, and are graduated in about four years. There is one year, the freshmen course in the academy, and one year of practical experience at sea. Any ship that is subsidized by the Government, or any private line who will volunteer to take them, they go to sea for a year on those ships, and then they come back to Kings Point for an advanced course, so to speak, for two years.

Q. Just let me get this straight. Where is the Kings Point Academy?

A. It is, you know where Great Neck is, it is right next to Great Neck.

[fol. 248] Q. In other words, you teach seamanship there generally; is that the idea?

A. The title of the course I teach is the handling and stowage of cargo first class.

Q. I understand. What you are interested in is, in stowage cargo, your first and foremost interest is safety to the ship; am I correct; would you put it that way?

A. First and foremost——

Q. Safety to the ship in the stowage?

A. Well, honestly, there are four objectives to good stowage.

Q. What are they?

A. The first is safety to the cargo. I am not saying it is foremost, but safety to the cargo is one of the objectives.

Q. And safety to the ship and crew?

A. Safety to ship and crew is another one.

Q. And safety to the men—well, that is the last.

A. Safety is the next objective, and the next objective is to get the maximum amount of use out of the available cubic. That is one of the objectives.

Q. In other words, whatever space you have, you want to get as much as you can in it?

A. To pay off, yes.

Q. What is the next factor?

A. The fourth one is the desire to get the maximum rapidity and systematic system in the discharging of the cargo; in other words, a rapid and systematic discharge. All of those four objectives enter into your decision where to put things and why.

Q. What I want to ask you is this, Commander, does the safety of the men who do the discharging, is that one of the objectives?

A. I beg your pardon?

Q. I say the safety to the men who do the discharging, would you call that a consideration that you have in mind?

A. Yes.

Q. Commander, I was a little bit confused: Did you yourself sail on ships, cargo ships?

A. Yes.

Q. And did you yourself ever carry pulp?

A. Yes.

Q. Newsprint or pulp, which?

A. Newsprint.

[fol. 249] Q. I understand. Have you seen pulp or newsprint, have you seen other vesels that carried it?

A. Yes.

Q. Have you ever been down to Pier 6, Bush Terminal, in the last couple of years?

A. Pier 6? Not in the last couple of years.

Q. That is known as the Waterman pier——

Mr. Behrens: I object to that classification.

Q. Pier 6, that is the Ryan pier. Do you know the Ryan Stevedoring Company, have you ever heard of them?

A. I have heard of them, yes.

Q. Have you ever seen the vessels that come from Georgetown within the last couple of years?

A. No, sir.

Q. Have you seen any other manner of stowage than what you call the bilge and cantling method?

A. I call it bilge and cantling, and also the chine.

Q. The word chine, does that appear in this textbook at all as far as you know?

A. I do not know whether it appears in that text or not.

Q. Now, I want to ask you this: May I come over here?

The Court: Yes.

Q. It will save a lot of time. Defendants' Exhibit D, that is newsprint, is it not?

A. It appears to me to be newsprint.

Q. And what are those planks for?

A. For rolling it over and up onto the second tier.

Q. Rolling it up or down, which is it?

A. Well, down or up.

The Court: Mr. Frank, I suggest that you stand over on this side, some of the jurors cannot see what you are pointing to.

Mr. Frank: I will point it out to them a little later.

[fol. 250] Q. How is your eyesight, pretty good?

A. 20-20.

Q. Mine isn't as good as that. That is why I am using this glass, and I want to pass this to the jurors. Tell me, do you see a plank on top here?

A. Yes, I do.

Q. At first I couldn't really tell until I got this. I want to show this to the jury. I am pointing to the plank on top of the second tier. Is that a correct description that I am making?

A. Yes.

Q. What is this here, a piece of dunnage?

A. Yes, that is a piece of dunnage, roughly broken off.

Q. And underneath are a lot of pallets?

A. Pallets to make a platform.

Q. To make a platform so they can roll it off. This is newsprint I notice that is being discharged with slings?

A. Ropes and slings, right.

Q. Tell me this: I will use your word, bilge and cantling, is that the term that you used?

A. Yes.

Q. In this particular system do you protect the bottom layers in some way; do you chock it?

A. Primarily the main thing is to have a good solid floor. If you are going to stow it that way you do not want to have too much space, unless it is very small, a couple of inches.

Q. Tell me this, the bilge and cantling system that you are talking about is used primarily or mainly with barrels, is it not, as indicated in this photograph?

A. Yes, and if you have a large amount of barrels it is practical to save cubic.

Q. Let us get back to this, well, pulp or newsprint in these huge rolls weighing between a half, approximately a half a ton to a ton and a half, of varying weights. You know that is the testimony in this case. Do you chock in some manner the bottom rolls?

A. The outboard rolls certainly have to be chocked, yes.

Q. With what? Wedges?

A. Wedges, and they do use in the trade, although I have never actually seen it, in the Scantic line trade, I understand that they do have a considerable amount of wood [fol. 251] pulp in bales, and that would be used to chock it.

Q. But one of the ways is wedges that are used for that purpose?

A. Yes.

Q. They are trianguler things?

A. Yes, made out of wood.

Q. As long as we have used this book, I wonder if you could turn to page 378, the subject is newsprint and some other paper. I am not going to read all these other things that are not important, but would you be good enough to read this?

Mr. Behrens: Are you going to offer this page in evidence?

Mr. Frank: As long as we have this part, we might as well have the other page too.

The Witness: Start here?

Q. You are now starting to read from the paragraph on the previous page marked paper; is that right?

A. Yes.

Q. And we are skipping some of these things that are not important, and if the jury want to they can look at it afterwards. Just read that.

A. "When a full cargo of paper is carried, a satisfactory way of doing this is by building a platform consisting of a series of steps, the width of which is seat the diameter of the larger roll, the platform to be resting on well constructed barrels. When mixed cargo is carried the floor can be leveled off up to the tier of the bilge by other suitable cargo such as clean dry lumber which is particularly useful for this purpose."

Q. Would you just go back to the series of steps that you referred to there, what are they made of?

A. They are made out of dunnage, rough lumber approximately, I guess in the trade known as No. 4 stock.

Q How thick are they?

A. One-inch, but those supports that they are referring to are 4 x 4. What they are referring to there is to take care [fol. 252] of the curvature of the hull, particularly in the end hold, I assume in No. 5 and No. 1, I suppose.

Q. You mean there is a sweep around there?

A. In the end hold you have got the curvature of the vessel, and you have to fit the cargo into that shape. Hatches No. 3 and No. 4 are deemed especially desirable for the stowing of cargo, because you do not have so much curvature there. If you have a lot of curvatures you have to use wood pulp or something to shape up the hatch so that you can have a place to rest the cargo on.

Q. But, Commander, if you will look at this book, what they are talking about is when you have a ship, a full cargo of paper is carried on the ship, and then they say that the way to do this is by building a platform.

A. That refers to when you have another kind of cargo with it, such as a mixed cargo. When you have a cargo of what we call filler cargo, then you have to use dunnage, and you use some of these things to fill out the cargo of pulp or paper that you have got in there.

Q. In other words, what you say is this, where you have space in between you fill it up as far as you can with certain kinds of filler cargo?

A. If it is available, and broken stuff.

Q. I understand, but on the other hand they are talking about a series of dunnage, or a series of steps consisting of dunnage here?

A. Platforms, that is to get it level they have to maintain it level you see.

Q. I want you to look at this, you have 20-20 eyesight. I wonder whether you saw what I think I see here. I want to show it to the jury in a little while.

Mr. Behrens: Could we have the exhibit identified for the record?

Q. This is Defendants' Exhibit E. This is Leemings' book, is that what you call it?

[fol. 253] Mr. Behrens: That is Commander Ford's book, or Captain Ford's book.

Q. Would you just look at that?

A. You are referring to these steps in here?

Q. Yes.

A. They are planks, platforms.

Q. Yes, platforms?

A. Yes, they build that up in an effort to level it, because here is what happens——

Q. Let me just ask you this——

Mr. Behrens: No, no, no, please. He is interrupting the witness in the middle of an answer.

Mr. Frank: I will give him a chance to finish, but I want to make sure that we are talking about the same thing, that is the only purpose.

Q. Just tell me this, will you: Now, we see here planks, do we not, or dunnage, whatever you call it.

A. Lumber, yes.

Q. Does that go clear across?

A. What I see here probably, the way it appears it would go all the way across.

Mr. Frank: May I just show it to the jury, and then would you be good enough to use this glass, as otherwise you will have a little difficulty. I do not know how good the light

it, but I will refer this to the Foreman of the jury, and he can pass it around.

Mr. Behrens: I cannot hear you.

Mr. Frank: I just want to point it out to the Foreman, what I am referring to.

Mr. Behrens: I think we ought to have it marked on the exhibit, so that we will know just what it is. I haven't seen it.

Mr. Frank: I will show it to you. Once you start to mark it you may efface this, as it is a very small mark.

[fol. 254] I want to show it to your Honor, and if we can identify it by some marking very well we will.

(Exhibit passed around to the jurors.)

Mr. Frank: Your Honor, may I point out this to the jury, that it may be a little difficult but if you use the magnifying glass you will see it.

The Court: Yes.

Q. So that we can identify it, what I have pointed out with the magnifying glass are planks, are they not?

A. Yes, sure.

Q. And they are, as you said, clear across?

A. From what I can see, as far across as those rolls are stowed in there.

Q. You mean in that fashion?

A. Fashion, yes.

Q. You have also pointed out in Exhibit D, you have pointed out planks on top of the second tier; is that right?

A. I see two planks, one here and one there (indicating).

Q. One alongside the man.

Mr. Frank: There again I am going to ask the jury to use the magnifying glass. If you will use the magnifying glass, you will see it.

Right alongside the man that is standing on one of these (indicating).

Mr. Frank: Mr. Behrens, I wonder if you will permit me to mark your photograph with an arrow so that the jury can have it illustrated.

Mr. Behrens: If there is no arrow there, all right.

(At this point, Mr. Frank placed an arrow on the exhibit.)

Mr. Frank: Now, I think that will be much more helpful. Just follow the point of the arrow and then look underneath it.

(The jury continued to examine the exhibit.)

[fol. 255] Mr. Frank: I think that is all.

Mr. Behrens: Do you wish to cross examine before my re-direct?

Mr. Schwartz: No, I have no questions.

Redirect examination.

By Mr. Behrens:

Q. Commander, I should like to explain to the jury visually, by the use of little rolls, the question of the plank, which plank was just called to the jury's attention, as well as the other two planks shown in the photograph, but before I do that, sir, I would like you to tell me what that picture shows between the first and second tiers of the pulp that is in stow; are there any planks between those two?

A. No, sir.

Q. Any floor between them?

A. No, sir.

Q. They are set up just like that, aren't they (indicating)?

A. Yes, sir.

Q. Isn't that what this picture shows under the wing?

A. Yes, sir.

Q. Now, let us just set these up here for a minute. Now, as I understand this picture, it shows the stowage of newsprint; they are putting this in under the wings; is that correct?

A. Yes, sir.

Q. What function do these planks have that are shown in the picture?

A. Well, from what it looks to me like, there is a lot of dunnage lying around in here, in the hatch——

Q. Yes.

A. —and it appears to me like it is a piece of dunnage that is not being used for anything at the present time. What I can see it looks like they have used it previously or maybe they are going to use it. It is hard to say. I would say it has no function at the present time.

Q. In other words, this plank to which Mr. Frank called attention by putting the arrow, so far as this stow is [fol. 256] concerned, it has nothing to do with it at the moment; is that so, in so far as you can see?

A. As far as I can see, yes. It looks like they have the plank to roll over this (indicating).

Q. That is my point about the plank, I want to make that clear.

If we are assuming that this stow comes out further, and I will bring it out further in just a moment for you.

(At this point, Mr. Behrens added more cylindrical pieces.)

Now, let us assume, sir, that the jury is looking back into the wing which we see in this picture, Exhibit D. You would have a depth of several rolls of paper, would you not, underneath here (indicating).

A. Yes, maybe five or six or perhaps seven.

Q. From the skin of the ship out you would probably have five or six rolls on the bottom; right?

A. Yes.

Q. Then you would have the second tier, as shown in here; right?

A. Yes.

Q. Now, bearing in mind the amount of the clearance you have between the second one and the deck above, what is the function of the planks that are shown here on which this roll of paper is (indicating)? I am referring to the roll that they are stirring; what is the function of the planks?

A. As a roadway on which to roll it out.

Q. How are you going to get it in here (indicating) unless you do use planks or something else as a roadway to roll it back and let it drop in the chine; is there any other way you can possibly get it in (indicating) on top of two layers?

A. Is that a question you are asking me?

Q. Yes. What I am asking you——

A. Possibly you could get it back outboard, but the hooks would come out, probably, and you would probably damage the rolls.

Q. Let me ask you——

A. This way you can roll it easier.

[fol. 257] Q. The planks that we see in this picture, the planks on which this roll is (indicating Exhibit D), are they permanently there as part of the stow?

A. No, sir.

Q. They are a temporary thing, are they not, in order that the third tier could be rolled and dropped into the chine, isn't that so?

A. Yes, sir, that is my opinion.

Mr. Behrens: I have no further questions.

Recross-examination.

By Mr. Frank:

Q. The picture that you saw in the other book with those planks across, those planks are permanently part of the stowage; are they not?

A. The other book?

Q. Yes, that other book (indicating).

A. That was different, a different——

Q. A different idea?

A. A different idea altogether.

Mr. Frank: That is all. I have no further questions.

The Court: What about these chocks or wedges, do they come as a regular part of the stowage?

The Witness: At the bottom?

The Court: Yes.

The Witness: Yes, sir. Inboard, if you have a bulkhead and have nothing in the square of the hatch, you would have to have some kind of chocking. The chocking would probably be at least, it is hard to say what, actually, I would say about a 6 x 6 with a little curvature to chock it up.

The Court: Do you have that picture?

Mr. Frank: Yes, your Honor. Is this the picture you are referring to, Exhibit 3?

The Court: Yes.

The Witness: 8 x 12, cut in a wedged shape.

[fol. 258] The Court: And that is to keep a roll that starts to roll, it holds it temporarily; does it not?

The Witness: It would hold it temporarily.

The Court: But if you just put a piece of board down or a scrap, it is liable to jump that; isn't that it?

The Witness: If it is much less than 2 x 6, a 4 x 4 or 6 x 6 lying there it would probably stop it.

The Court: But anything under that, it might roll over?

The Witness: It might, yes, sir.

The Court: But you prefer a chock or a wedge, don't you?

The Witness: Yes, sir, it would be safer with a wedge.

The Court: All right.

Mr. Behrens: I have no further questions.

Mr. Frank: Nothing from me.

Mr. Behrens: I wonder if we might have a five-minute recess at this point.

The Court: We will take a ten-minute recess.

(Short recess.)

DON MILLER FISHER, recalled to the stand, testified further as follows:

Direct examination.

By Mr. Behrens (continued):

Q. I believe when we left off, Captain, in your testimony we were discussing the loading of this cargo pulp in Georgetown. Can you describe generally what you did as a mate during the loading of this cargo; what was your job to do as a mate aboard this ship?

A. Well, the job is a little hard to describe because they are so many various jobs connected with it. One job, for instance, was that I would go in and out of each of the five [fol. 259] holds, and I would check to see that they were loading the cargo properly and chocking it, and that they were not damaging it, and then from there I may go out on the dock and check the draft to see that the ship is being loaded evenly, on an even keel—there are quite a few various other jobs that might be assigned to me during the course of my watch by the chief officer. The primary job, of course, was watching the cargo, this is in port, and to see that it is loaded and stowed properly for the safety of the vessel and the cargo and the crew that sails the vessel.

Q. I take it that you didn't spend all of your time at Georgetown at any one particular hold?

A. No, sir, I didn't; that would be almost an impossibility, that is to do so.

Q. In other words, you were all over the vessel at this time?

A. All over, yes, sir.

Q. Now, I am interested in the stowage of the cargo at Georgetown, that is as to whether you directed any of Ryan's men to do anything.

A. As an officer aboard, I don't have the authority to actually direct any of the longshoremen in loading this cargo. They are hired by the stevedore who is the boss, the ship foreman, and he is the one that is in charge, I would say of the detail work of the vessel. However, the stevedores and the chief officer and the mate on watch generally cooperate and work together in the stowage in the overall stowage of the cargo.

Q. What if anything, did you have to do with the details of the stowage, and what I am interested in is this: Did you tell the stevedore to put this pile here, put that pile here, put another pile here?

A. No, I didn't. In fact, that would almost be impossible because the stevedores—well, he has a plan of the vessel and how much cargo and how much has to go into here, and he has figured out to the best of his ability how and where to [fol. 260] stow this cargo. From an overall picture, if it is satisfactory with the mate, then, why, that is the way it is stowed.

Q. Now, there has been a drawing here which you made when you were examined some time ago. It has been marked Plaintiff's Exhibit 3 in evidence. Do you remember drawing that picture, Captain Fisher?

A. Yes, sir.

Q. What does this picture purport to show or this diagram purport to show?

A. Well, I was attempting to draw a wedge, what we call a wedge or a chock, it is commonly called either one.

Q. With reference to the wedge of the chart which you have drawn, what is the purpose of such a wedge or chock with reference to a cargo of paper pulp?

A. Well, when the first tier of paper pulp is loaded into the vessel, these chocks are used to put under the edge or

ends of the roll to keep them in place. That is for the first tier because they are all on the same level, and to keep them from rolling or shifting in any heavy weather, that is when the vessel may be rolling or pitching.

Q. Are those chocks ever used on a second or third tier, that is when the chine method of stow is used on paper?

A. No, sir, that is absolutely not necessary.

Q. In other words, you use chocks of this character down on the first row, that is the row next to the deck or the dunnage over the deck; is that correct?

A. That is correct.

Q. Now, at Georgetown when you listed this cargo of paper pulp on the 15th and 16th of July, did you see any chocks like that aboard of the vessel?

A. Yes, sir.

Q. Did you see chocks like that anywhere else in the vicinity of the vessel?

A. There were chocks on the dock. They use them on the dock. They have a quantity of them there, generally, in case you don't have enough aboard the vessel.

[fol. 261] Q. In that case, they lift them up off the dock and put them aboard?

A. Yes, but we generally carry a quantity of them aboard. When paper is discharged, the chocks are left in the vessel and are put around in the wings and sides, and they are used over again, over again.

Q. Did you see Ryan's men use chocks like this aboard the vessel on the 15th and 16th of July?

A. Yes, sir, they were using this type of chock.

Q. Now, at any time while this cargo was being lifted did you see them using pieces of dunnage or scrap wood in place of these chocks; did you ever see that?

A. No, sir.

Q. Let me ask you this, sir, and I would like to use a few of these, if I may (indicating small wooden cylindrical pieces).

Let us assume that Ryan's men at Georgetown put a roll up over here fore and aft near the skin of the ship (indicating). Then, they put a second roll (indicating) and then they put one alongside of the one here (indicating), one here, one here (indicating), and at that point you see it as it happened to be in this particular hold. Now, can

you tell whether they have chocks underneath these rolls that are alongside of the skin of the ship?

A. Not after they are loaded in.

Q. You can't see it any more?

A. You can't see down under there, no.

Q. As they continue across the bottom layer of the hold, let us assume that that has happened, that is that when you come to this particular hatch the whole bottom layer is done there on the floor of dunnage over the place of the ship, can you tell whether they have put any chocking in there or not?

A. No, sir.

Q. You can't see it?

A. You might see one here or there, in a crack, but you couldn't see if they were all chocked, that would be impossible.

[fol. 262] Q. Suppose that instead of the chock you have described they had put dunnage or nothing between those rolls at Georgetown, and you looked down at this whole lower floor filled with rolls of paper pulp, could you tell hat they had done to secure it?

A. No.

Q. Now, with reference to the stow in No. 3 hold of the Canton Victory at Georgetown on July 15th and 16th, 1949, and not referring to any other part of the vessel but just that hold, how generally was that cargo stowed, the method which Ryan used in stowing the cargo?

A. We call it the chine method.

Q. The chine method?

A. Yes.

Q. Would you also call it the bilge-cantling, would that be a fair description?

A. Yes, sir, or a nesting method.

Q. Have you heard it called nesting; have you?

A. Yes.

Q. Have you seen that method of stow before with paper pulp?

A. Yes, sir.

Q. With reference to this paper pulp, have you seen occasions aboard your vessel where instead of stowing in chine you have seen other methods of stow?

A. Yes, sir, I have seen other methods of stow.

Q. Would you describe the circumstances under which you have seen other methods of stowing and the reasons for it, just what the stow is you refer to?

A. When you use any other method except this method, we call it in chine, it is almost a special circumstance. Back in, say, the pockets or where the vessel comes together—in other words, when you put the rolls in you couldn't put them absolutely flush, you would leave a hole and there you may floor over, that is with this heavy dunnage so that you could put another roll up here (indicating) and come on up with it. You would also maybe use it when you varied the size of the rolls of paper, like if you had, well, say in general four-foot diameter paper and for some reason, [fol. 263] sometime you might get a special load of size of paper that is a little bit smaller in diameter, then you may use a floor there to start a new size of paper. But when the consistency is nearly the same in its size, of the rolls, this is, I suppose, the accepted way that we always used to stow the paper.

Q. Now, on the day of the accident, July 20th, I think you told us Ryan's men came aboard and started to work at 8 o'clock in the morning; is that correct?

A. That is correct.

Q. Now, during that day, from 8 o'clock in the morning until the time Palazzolo was hurt, how many of your hatches were being worked by Ryan's men?

A. Well, all hatches, all five hatches.

Q. And that continued throughout the day up until the time that Palazzolo was injured?

A. Yes, sir.

Q. Now, you were down in No. 3 at the time he was hurt: weren't you, Captain Fisher?

A. Yes, sir.

Q. About what hour do you fix the time of the event?

A. It was 4 P. M.

Q. About 4 P. M.?

A. Yes, sir.

Q. How long had you been down there, according to your present recollection, before Mr. Palazzolo was injured?

A. That is hard to say; I think maybe five minutes, it could have been ten minutes.

Q. Do you know where you had come from aboard the vessel before you got there?

A. No, sir. I generally make my periodic inspection from one hatch to the other hatch, and I don't know where I had come from, which hatch previously I had come from.

Q. You may have come from No. 2, if you were coming aft; or No. 4, if you were going forward?

A. That is correct, yes, sir.

Q. Would you describe generally the condition of the hatch, as to the amount of the cargo discharged when you came down into No. 3 lower hold, about how much of it was out, how much was left and so forth?

[fol. 264] A. Well, they had discharged everything in the square of the hatch, that is where the opening of the hatch is, down to the bottom, and they were going back in the wings and were breaking out the paper back in the wings.

Q. Could you approximate how much of the cargo had been discharged, taking the whole of No. 3 compartment?

A. Yes, sir, approximately three-quarters—it is hard to say accurately now.

Q. You would approximate it as being—well, a quarter of the cargo was still left to be discharged?

A. Yes, sir.

Q. Could you tell us how long the square of the hatch is in No. 3 hold?

A. Let's see, I think that is approximately 60 feet.

Q. I am not asking for the overall length of the entire hold, I am only interest-d in the hatch opening, the square of the hatch.

A. I am sorry—it is about 30 feet.

Q. About 30 feet?

A. Approximately 30 feet.

Q. Fore and aft in the square of the hatch?

A. That is correct.

Q. You would guess that the hold from the bulkhead fore and aft might be as much as 60 feet?

A. I don't think it would be quite that much. It might be but I don't remember the dimensions of the holds exactly.

Q. And about how wide, not the hold, but the square of the hatch, about how far athwartships?

A. Approximately, maybe 24, 25 feet.

Q. So, as I see it, you would describe the square of the hatch in No. 3 lower hold as about, say, 30 feet long, and perhaps 24 or 25 feet wide; right?

A. That is right.

Q. Now, about how long were these rolls of pulp that you carried from Georgetown on this voyage, roughly what sizes?

A. Most of them were about four feet in diameter, but they varied in length, three feet, four feet, five feet, depending on the customer's demand for the rolls and what [fol. 265] sizes they wanted them in. They cut them at the middle for whatever order they may have them, to whatever length they want them.

Q. Now, when you went down there, you said that the square of the hatch was clear; is that correct?

A. Yes, sir.

Q. At that point could you tell what, if anything, was securing the bottom rolls under the wings; could you see there at that time?

A. You mean like this (indicating on cross board on witness stand)?

Q. Yes. The bottom roll along the square of the hatch, could you see at that point?

A. Yes, sir.

Q. What, if anyhing, was used under the rolls or was under the rolls when you came down there?

A. These wedges or chocks.

Q. Did you see any scrap dunnage holding these rolls back?

A. Not as I recall.

Q. It is your recollection that you saw chocks there?

A. Chocks, yes, sir.

Q. Now, I wonder if while you were there if you watched these longshoremen of Ryan's breaking down these rolls in the wings?

A. Yes, sir.

Q. I wonder if you would be good enough to describe for the jury just exactly how they were doing it while you were down there.

A. Well, the paper was stowed like this (indicating) and they have these long wooden pry bars, they call them, made

of oak and hickory, and they have a little taper like a wedge at the end of them. They are pointed at the end and they have these chocks under each end of the roll here (indicating) and they come in here (indicating) and they pry, they move these chocks back a little ways enough——

Q. When you say a little ways, what you mean, Captain, is that they move the chocks back a little way, well, about how much?

A. Well, approximately the diameter of the roll, four, three, four feet.

[fol. 266] Q. Yes.

A. And they get in the end here (indicating), and they pry, and they pry this roll here (indicating), and this one (indicating), and they keep prying it because this is secured back here (indicating), and that roll will drop down in the center there, and then they will roll this out to the square of the hatch and discharge it.

Q. What is the purpose of taking the chocks out of the bottom roll and bringing it out into the square of the hatch, as you pointed out, four or five feet? Why not just throw them away at that point?

A. Well, that is a safety precaution. It is generally used by the longshoremen to keep the roll from running rampant in the hatch.

Mr. Frank: I didn't get that.

The Witness: It keeps the roll from just rolling free in the hatch.

It serves as a chock when this roll (indicating) comes down between there (indicating), a stop like.

Q. When that bottom roll came out and is displaced by the second tier, it moves up to where these chocks are; is that right?

A. That is correct.

Q. And the object of the chocks there is to keep it from going further?

A. That is right.

Q. Now, did you actually see the roll of pulp strike Mr. Palazzolo or roll on him; did you actually see that?

A. No, sir, I did not.

Q. What was your position with reference to him at the time, the very instant that roll hit him?

A. The very instant I had my back to the man, I was watching the inshore gang discharging or breaking down some of these rolls of pulp.

Q. Now, immediately before the accident, before you had your back to him, had you seen what he and the other fellows were doing?

A. Yes, they were working with this tier of pulp there, [fol. 267] passing it out (indicating), and Mr. Palazzolo was standing out in front here (indicating), some place in the square of the hatch.

Q. Who was doing the prying when you last saw it?

A. That I don't know who was doing the prying. I mean there were four men in that gang, there are eight men in the gang and they would split into two gangs, and there were some on this side working there and there were others, two or three, I don't know, working with that, they were prying it out.

Q. Now, what was it that called your attention to the fact that a roll of paper was on Mr. Palazzolo's leg?

A. Well, I heard him scream, I heard a rumble and the roll fell, and I heard him scream and I turned around.

Q. Now, at the moment you turned around, at that very instant, was there any roll of paper going up or down on the ship's gear?

A. No, sir.

Q. Was the ship's gear in motion in any way at that moment?

A. No, sir.

Q. Now, what if anything did you do when you saw Mr. Palazzolo with this roll of paper on his leg?

A. Well, I guess I did naturally what anybody would do. I ran over with a lot of other longshoremen and tried to lift the roll off, but I couldn't lift the roll off because the rolls are pretty heavy, and they are round and there is not much which you can get a hold of them with. They lowered these clamps down and hooked on to it, like we were discharging a roll, and picked it up off of him.

Q. Now, which hook was that that came down for Mr. Palazzolo?

A. That was the after set.

Q. And that came down from the main deck, did it?

A. Yes, sir.

Q. Could you have used the forward hook?

A. For that roll?

Q. Yes, sir.

A. No, sir.

Q. That wouldn't reach back that far?

A. It would reach, but it was not practical. It probably [fol. 268] would have crushed the man, it would have dragged it off of him instead of lifting the load off him.

Q. Could you describe generally as to how Mr. Palazzolo was, as to whether he was on his side, face up or face down? Just describe what you saw at that moment?

A. Well, to the best of my recollection, I think he was laying on his right side, and the roll of pulp was down on his leg, his left leg.

Q. Did you see any chocks near Mr. Palazzolo in front of the roll that came down; did you see any chocks, well, say four or five feet out from that tier?

A. There were chocks down there. At the time of the accident, I don't know, I was concerned with the man's injury, but there were chocks down there. I can't tell you exactly where they had been, but they had been in front of the rolls when they had been working with them previously.

Q. Let me ask you this, Captain: There has been some testimony about men standing in the square of the hatch, watching rolls of paper go up; was there any place at the time of the accident where such men could go under the wings or elsewhere without standing in the square of the hatch as a roll went up?

A. Well, at that time, yes, there was.

Q. Where was that place?

A. I was back in there myself, that is where I was standing.

Q. Where were you standing?

A. In the after end of the hatch, under the square of the hatch, under the coaming, we call it. Then that had been cleared so the men could go, and that was in case a wire breaks or a roll does fall or any cargo.

Q. In other words, there was room in the after part

of the hatch beyond the coaming, toward the bulkhead, where you were standing; is that right?

A. That is where I was standing.

Q. If something fell down from the main deck, through the square of the hatch, you were away from there; is that right?

A. Yes, sir.

[fol. 269] Q. There has been some testimony about a list on the vessel during discharge; is that an unusual thing or is that usual and ordinary?

A. That is very common to have a little list on it because you swing the booms out to whichever side the dock is, and you take, say, these rolls of pulp or any kind of cargo, that is which has several loads at one time, they were being swung over the side of the ship, and that would cause the ship to list a little, a few degrees back and forth. It is very hard to either load or discharge a ship on an absolutely even keel. It is ideal to think you could, it is next to impossible to do so, though, I mean, in all frankness——

Q. On this day in No. 3 lower hold, did you notice any unusual list on the vessel?

A. No, sir.

Mr. Behrens: You may inquire, Mr. Frank.

Cross-examination.

By Mr. Frank:

Q. The purpose of these wedges when they move them out, I think you explained, is to prevent them from running rampant; isn't that the word that you used?

A. That is the word I used, I think.

Q. In other words, when they start to get a little momentum, they could do a lot of damage?

A. They could, yes.

Q. And furthermore, particularly if you have a list, even a small list, that would help to give a little more momentum; is that right?

A. Yes, it stands to reason.

Q. And the list, of course, you said you can't help the list because of your booms that are over on the dock side; you were discharging on the dock, weren't you?

A. Yes, sir.

Q. Did you also use the term that these longshoremen use, offshore and inshore?

A. Yes, sir.

Q. The man that was injured was from the offshore gang, you know that?

A. Yes, sir.

[fol. 270] Q. You were watching at the time the inshore gang?

A. Yes, sir.

Q. So that at the time of the accident all the booms that were overboard were on the inshore side; is that right?

A. That is correct.

Q. That is what would cause a list, whether it was small or large, it would cause some list?

A. It would cause some.

Q. These wedges became very important to hold them from running away or running rampant; is that right?

A. That is true.

Q. Now, tell me this: As I understand you. When you were at Georgetown you had a lot of work to do without watching each load of paper go down; is that right?

A. That is right.

Q. You have got five hatches and you were known as the cargo mate, weren't you? Isn't that what they usually call the second mate?

A. Yes, sir.

Q. So that, as you told the jury, it is impossible for you to know whether they put wedges after the stuff is down there, whether they use the wedge, or whether they use a piece of dunnage, that is pretty hard for you to tell?

A. It is hard to see when you have got five hatches and you have got eight men to a gang. You have got a lot of men and you can't possibly watch each man stow each roll.

Q. I understand that.

Let me get this, Mr. Fisher: You are still employed—whom are you employed by?

A. Waterman Steamship.

Q. At the time of the accident on the Canton Victory, you also considered yourself a Waterman man?

A. Yes, sir.

Q. Well, you know, of course, we have straightened that out, it is really the Pan Atlantic Steamship Corporation. Does that name mean anything to you?

A. Yes, it is familiar.

[fol. 271] Q. Is Waterman, that is the parent corporation——

Mr. Behrens: I object to that as irrelevant.

The Witness: I don't know.

The Court: Yes. Don't bring the Waterman into this.

Q. You are still employed by the same people that you were employed by at the time of the accident; is that right?

A. Yes, the Waterman Steamship.

Q. Now, tell me: The system that you call the chine system, did you always use that or did you sometimes use another system?

A. We always use the chine system except in special circumstances.

Q. You remember you testified in an examinaiton before trial?

A. I remember.

Q. At my office?

A. Yes.

Q. Now, what do you call the other system? Is the word flooring off system a good system?

A. It is a proper terminology what you are referring to.

Q. And didn't you use the flooring off system at hatch No. 3 time and again?

A. Now, let's see—no—I mean it is possible that we used it in places there, say in behind the stanchions, say, where you couldn't get the rolls out, there you would have to use it if we had some purpose, or we had some broken stowage in there. It is hard to recollect, but if we had a full cargo for that hatch we probably wouldn't, we don't use it.

Q. Tell me this: Don't you use the flooring off system almost exclusively in the last couple of years?

A. Almost exclusively?

Q. Yes.

A. No, sir.

Q. Have you been coming into New York for the past couple of years?

A. For the past three years every two weeks.

Q. You know these men, don't you?

A. Yes.

[fol. 272] Q. Like Louis?

A. I know them by their faces, yes.

Q. You have seen them?

A. I have seen them in the hold working in the ship.

Q. And in the discharge of rolls where they use the flooring off system in discharging, you just roll them out the square of the hatch; is that right?

A. Well, that would be right, yes; if you had any occasion to use that system that is the way you would get them out, it would be just like on the first tier.

Q. Well, let us see where you do it. Your first tier you place your rolls fore and aft wherever you can, except in certain parts where you place them aburton?

A. Yes.

Q. Then you put planks over them, is that right?

A. Well, if I were going to use that system, yes, if for any particular reason I had to lay a floor.

Q. That is the system. I say you saw that system used by our ships?

A. Yes, in special circumstances we do use it.

Q. You say special circumstances?

A. Like I mentioned before, if you change the size of rolls, or if you are back in a pocket, say in No. 4 hatch or in No. 1 hatch where you have got the bow of the ship coming together, you have got to fill up here.

Q. I am taking out the special circumstances. I want to ask you this: In the last few numbe. of years haven't you seen your ships come in with the flooring off system entirely?

Mr. Behrens: I object to the form of the question. Mr. Frank has used the word "your ships." To my knowledge this witness has sailed on one vessel in the last three years.

Q. I assumed that he was still on those vessels. Let me ask you this, sir, do you see the ships that come into New York that carry pulp?

A. Well, the ship that I have been on for the past three years I do, yes.

[fol. 273] Q. The Canton Victory carried pulp, did it not?

A. Yes.

Q. Were you on the Canton Victory after this accident, after July, 1949?

A. Yes.

Q. Did you carry pulp on the Canton Victory then?

A. Yes.

Q. Did you come into New York?

A. Yes.

Q. All right. Hadn't you seen from that time on that they were using the flooring off system almost exclusively all around?

A. Not that I can recall.

Q. You ought to be able to recall it?

A. Not without having some special reason for using the flooring off system, no.

Q. Where they use the flooring off system you said there were special conditions such as where you have a pocket, or where you would want to put some extra cargo; is that what you meant by the pocket?

A. Well, there are certain places where you have spaces lower down, that are not big enough to put a roll of paper in, and you cannot put a roll over it, so you would floor off that particular area.

Q. You floor it off and put another roll on top?

A. Then you can put rolls over that.

Q. Well, now, is it just as easy to use it in rolling the paper out of No. 3 where you use the flooring off system?

A. Certainly, it would be just as easy.

Q. Tell me this: In using that system all you have to do is to roll them out to the square of the hatch, and after you get through with one tier you would remove the dunnage, take it up on the upper deck; is that right?

A. That would be correct, if you use that.

Q. Haven't you seen that used continuously in the last few years at Pier 6?

A. No, sir, I cannot say that I have. We always use the chine system.

Q. You use it now?

A. Yes.

Q. You mean that?

A. Yes, I mean that.

[fol. 274] Q. Let me ask you this: I notice in this cargo plan you had some citrus fruits that you picked up at Tampa; do you remember that?

A. Yes.

Q. Where did you stow them?

A. That was stowed at the forward end.

Q. Of what?

A. The forward end of the hatch, all the way across the hatch in the forwad end.

Q. No. 3?

A. Yes, and then, I am not sure whether it was stowed in the after end, I do not recall.

Q. Then did you put some planks over it, some dunnage?

A. Not that I recall. I think that was all stowed in the forward end of the hatch. There might have been some across the after end. Sometimes it is a bit difficult to get rolls of paper behind the stanchions, and so we use that space for stowing citrus fruits.

Q. Would you put this 465 tons of pulp over it?

A. Well, if the pulp came up that high. I can't recall now exactly. There are times when we stow pulp, when we stow citrus on the deck and floor it off and put the pulp on top of it, there are times when we do that.

Q. Did you do it this time, do you know?

A. No, not in the lower hold. In the square there was none, to my recollection there was pulp stowed in the square, that was just paper.

Q. Let me read—do you remember making these answers? Let me ask you this: "According to this plan here, in hatch No. 3, was there anything else in the lower hold but paper pulp?"

This is on page 20.

"Q. "Q. Was there anything else in the lower hold but paper pulp? A. There was citrus, canned citrus."

That is in cans, is it?

A. Yes, that is in cartons.

Q. In cartons?

A. That is right.

"Q. There was? A. Yes, sir.

[fol. 275] "Q. Where was that put, on top? A. In the lower hold.

"Q. Below? A. Yes.

"Q. In other words, first you put your cans of citrus. How is that packed, in cases or—— A. Cases, cardboard cartons."

Q. That comes in cartons?

A. Yes, the cans are packed in cartons 24 cans to a carton.

Q. 24 to a carton?

A. That is right.

Q. Then, "Q. And you put a certain number of layers of that in the lower hold?

A. Yes, sir.

"Q. What do you put on top of that? A. Dunnage."

Do you remember that?

A. I do not know whether if you were speaking specifically at that time throughout any number of hatches, that is what I thought you were speaking of. At times we do put citrus down, and where we have occasion to we load paper on top of it.

Q. But you say you do not know whether I was referring to that particular hatch?

A. I do not remember that.

Q. I see. Well, now, tell me this: You put your citrus fruit down on the bottom, and then put 465 tons of pulp, does this flooring, is that inclined to be a little uneven or shaky?

A. No, sir.

Mr. Behrens: I will object to that. That is purely speculative.

The Court: He says no.

Mr. Behrens: The question is still objectionable.

Q. In other words, is it just as solid this way?

A. Yes.

Q. As long as you have an even flooring, is that right?

A. That is right.

Q. And as long as your bottom rolls are protected when you clear the square of the hatch?

A. No. State that again?

[fol. 276] Q. I say as long as your bottom rolls are properly wedged when you clear the square of the hatch?

Mr. Behrens: I do not understand the question.

A. I do not understand either. We are speaking of cases of citrus juices.

Q. No. Let us start all over again. What you would do is get an even flooring?

A. That is right.

Q. Another thing you want to do is to have it properly wedged when you clear the floor of the hatch, when the longshoremen clear the floor of the hatch?

A. I do not follow it. Let me explain it to you.

Q. Let me withdraw it, and put it in a different way. As I understand in safe stowage you have in mind the safety of the cargo; is that right?

A. Yes.

Q. Safety of the ship?

A. That is right.

Q. Safety of the crew?

A. That is correct.

Q. And also the safety of the longshoremen that come on board to discharge it?

A. Well, yes, we take that into consideration.

Q. You take that into consideration. If you had seen pieces of dunnage used instead of wedges over in Georgetown would you have said something about it?

Mr. Behrens: I object to that as hypothetical.

The Court: I will allow it.

The Witness: I think I would, if I had seen it, yes.

Q. Why would you say something about it? Anything wrong about it?

A. Because they are not the proper chocks for chocking the paper, when we have proper chocks aboard.

Q. In other words, when they start to break down a tier a roll may get away if it has dunnage instead of proper chocks like wedges, is that what you mean?

A. There is the possibility of that, yes.

[fol. 277] Q. Do I understand you to say that you saw wedges on this particular pile; is that what you said?

A. Yes.

Q. Before the accident?
A. Yes.
Q. You looked at it?
A. Yes.
Q. Did you look at any other piles?
A. Yes, and there were wedges.
Q. You looked all over and there were wedges?
A. I would say there were a lot of wedges there. I didn't look at every one but there was, as I recall in my mind there were wedges there, and there were wedges under the rolls that they were working.
Q. Were some of the men there working?
A. Yes.
Q. Were the men working in the forward gang too?
A. There were men in the forward gang, yes.
Q. Were they breaking down?
A. I think they were.
Q. You said Palazzolo was out in the square of the hatch?
A. Palazzolo was out in the square of the hatch, in the after end.
Q. What was he doing in the square? What was he doing, just standing idle there?
A. I don't know what he was doing. I suppose he was working, yes.
Q. As I understood you to say, there were no rolls being attached at that time?
A. No, sir.
Q. Was he alone out in the square?
A. I don't remember, but he was the one hit by the roll out in the square.

Mr. Frank: Louis, will you stand up?

(A man stands in the courtroom.)

Q. You remember him, don't you?
A. Yes.
Q. You have seen him around a lot?
A. Yes.
Q. Was he out in the square of the hatch?
A. I don't remember if he was.
Q. Have you any idea?
A. I probably wouldn't have remembered that Palazzolo

was out there, if I had not known that he was hit by this roll.

[fol. 278] Q. But you remember Palazzolo was out there in the square of the hatch?

A. Because he was hit and was right there with the roll on him in the square of the hatch.

Q. Do you remember after the accident you spoke to Louis, did you not?

A. Possibly I did.

Q. Don't you remember going over to him and saying to him; what happened, how was the man hurt, do you remember that?

A. I think I did.

Q. And you also remember asking him was the gear all right; do you remember that?

A. No, sir, I did not ask him that question.

Q. You did not ask him that?

A. No.

Q. Let me continue. And he said it was not the gear, what did you mean by gear?

A. That is the cargo gear.

Q. The cargo gear?

A. The cargo gear.

Q. He said it was not the gear, the gear had nothing to do with the accident; do you remember him telling you that?

A. I don't remember that.

Q. Do you remember that you were there?

A. Yes, I was there.

Q. Down below?

A. That is right, when the accident happened.

Q. Tell me this——

A. I think you asked me, may I say something?

Q. Sure.

A. I think I made a statement immediately that evening, say around 5 o'clock or 6 o'clock, a short time after the accident.

Q. To whom did you make it?

A. To my company, a written statement——

Mr. Frank: I am sorry. Will you direct the witness not to make any further statements about that statement that he made out? That statement is certainly not binding on us.

The Court: All right, leave it alone.

Q. Tell me, Fisher——

[fol. 279] Mr. Frank: Will the winchman stand up, please?

(A man stands in the courtroom.)

Q. Do you remember the winchman?

A. I don't remember if he was on the winch or not; I know the man.

Q. Do you know the gangwayman, Mr. D'Amico?

A. If possible—he is the hatch boss, yes, I know him, yes.

Q. You know him?

A. Yes.

Q. Do I understand that after the accident you were interested in the man, that is what you told us?

A. I beg your pardon?

Q. I say after the roll hit him, you tried to help him?

A. Yes.

Q. And——

A. They lowered a hook down, and they put the clamps on.

Q. There was no hook down there at the time he was hit, that is true, isn't it?

A. That is true.

Q. Well, we find Mr. Palazzolo was in the square of the hatch at the time; is that right?

A. That is right.

Q. You say that you saw him there?

A. Yes.

Q. How far away would you say he was inboard on the coaming?

A. Now, just a minute here. Inboard?

Q. He was on the offshore side.

A. He was working on the offshore side.

Q. He was in the square of the hatch?

A. In the after end.

Q. In the after end?

A. That is right.

Q. How far in was he in the square of the hatch, would you say about, from the coaming?

A. It would be, it is hard to say, several feet I guess.

Q. All right, several feet. There was no work that was being done that could bring him down there, bring him in the square at that time, was there? Nothing was going up you say?

A. Not to my recollection.

Q. I mean, you are not sure of this, are you?

A. I do not know if there was anything he would have been doing. Maybe there was, I don't know, I don't recall that. [fol. 280] Q. You said you yourself were standing in the after end of that hatch, was that near the ladder?

A. Yes, back behind the ladder.

Q. Do you remember other men standing near the ladder?

A. I do not remember if they were or not; they may have been.

Q. Do you know that fellow Jerry?

A. Jerry, yes.

Q. You have known him?

A. Yes.

Q. Did you see him near the ladder?

A. I can't recall.

Q. Would you say that the roll that hit Palazzolo, that you saw that pile, you actually saw chocks under it, do I understand before the accident?

A. Chocks under what?

Q. Wedges under the roll.

A. Under the roll that hit him?

Q. Under the roll that hit him.

A. I did not see which roll hit him. I didn't see the roll hit him. All I have is what some of the fellows said, they told me what happened. I asked them what happened when I turned around, and I heard this screaming, and they said a roll of paper fell off the top of it, bounced off him.

Q. Off the top?

A. That is what they told me at the time immediately after the accident.

Q. Did you see any other roll in the square of the hatch at that time?

A. There might have been one, I do not know. I cannot be positive of that; there possibly could have been a roll there.

Q. Tell me this: Didn't you have a lot of trouble when

you were using the chine system around the time of the accident with men getting hurt?

Mr. Behrens: I object to that as irrelevant.

A. What do you mean——

Mr. Behrens: Wait a minute. I object to that question. We are going to get off into other factors very quickly if that line of interrogation is permitted.

[fol. 281] The Court: What has that got to do with this?

Mr. Frank: Well, if the chine system, as I contend, proved satisfactory and they changed it to some other system, as I will prove——

Mr. Behrens: I would object even to that, your Honor, as immaterial——

Mr. Frank: All right, I withdraw it.

The Court: Yes, we are not here to decide about systems, except the question of negligence, that is all.

Mr. Frank: I withdraw the question so that there will be no argument.

The Court: By the way, you said you saw chocks there, wedges, didn't you?

The Witness: Yes, sir.

The Court: Are they supplied by the ship?

The Witness: Yes, and they are supplied by the stevedoring firm if they are requested, just like dunnage.

The Court: I mean you have them there.

The Witness: Yes, sir, we had them as part of the ship's gear.

The Court: Yes, it was an appliance to be used.

The Witness: Yes, sir, that is right.

The Court: Whether they used the chine system or some other system, if the wedges were called for they were there to get them?

The Witness: Yes, sir, but you have no use of wedges when you put a roll in the chines, the two other rolls that are in the first tier, when they are on the level floor, they will hold the roll above them.

Q. You mean the two rolls on the bottom?

A. Yes, there are two rolls on the bottom, and they are level, and when the rolls are placed on top of them they hold that roll.

[fol. 282] Q. You mean the rolls that are on the bottom that hold the roll?

A. One roll will automatically chock the other two rolls, that is the idea.

The Court: You actually were there ten or fifteen minutes before the accident?

The Witness: Yes, five or ten, maybe 15, I don't know exactly.

The Court: You were looking over what was going on?

The Witness: I was looking over the situation, yes.

The Court: Do I understand you to say that you saw chocks under this system?

The Witness: Yes, sir, I saw chocks down there, we had chocks down there.

The Court: Under that lower row?

The Witness: Yes, sir.

Q. Did you also see dunnage under there?

A. Dunnage on the deck?

Q. Yes.

A. In the square of the hatch there was no dunnage.

Q. How about in the wings?

A. The hatch was clear, out in the wings you could see rolls of paper. You could practically see—there in the square of the hatch they have an extra, maybe two or four inches of heavy oak which is bolted to the deck, it is called the ceiling, but it is actually on the deck. That is just in the square of the hatch, and that is just in case something heavy, a heavy object would be dropped down it would not do any damage to the double tanks underneath that.

Q. I am not talking about the square of the hatch, it is in the wings; do you have pieces of dunnage there?

A. In the wings. I have to explain that. You have a little drop, say, from the square of the hatch just down a little bit, and it is quite a common practice, I don't remember if it was there or not, but it is quite common practice to put two layers of dunnage up, a couple of layers of this one-[fol. 283] inch dunnage to make it an absolutely level floor all over. That is not always done, but as a practice they do do it.

The Court: Did you see any dunnage, as you call it, where the chocks would be ordinarily, or the wedges?

The Witness: I can't recall, sir.

The Court: In other words, scrap dunnage.

The Witness: Well, I mean there is always a certain amount of just scrap stuff, broken dunnage, lying around that you can find in every ship, in every hold.

The Court: But you did see chocks under this particular roll?

The Witness: Yes, sir, there were chocks there.

The Court: All right.

The Witness: I saw them before, and I noticed them after.

Q. Under which particular roll?

A. Well, the roll, the tier they were talking about, the roll came off of. I was talking about the lower row, but these fellows told me the roll came off the top, somehow, and fell over on this fellow.

Q. Did you see some men working breaking out in the forward part of the hatch there?

A. There were some men down there working, I couldn't imagine what they were doing.

Q. Is that what you meant when you said that you saw men breaking down?

A. Yes, there were men working with the pulp. I don't remember seeing the men in detail, and exactly what faces were around there and as to exactly what the things were that they were doing, but I saw men there.

Q. That is it. Did you see——

A. It was only when the accident happened, it is only at a time like that you particularly notice what those men are. There were 14 men working down, or 16 men working down there all over the hold.

[fol. 284] Q. That is what I mean, going back to the very start, you said that the men were breaking down there, as I understood you to mean, and is that what you mean that they were working down there?

A. I imagine that that was what they were doing, that was the object of their being in the hold.

Q. And the only time that you got your mind focused on Palazzolo was when the accident occurred; is that right?

A. I think that is correct.

Mr. Frank: That is all.

Cross-examination.

By Mr. Schwartz:

Q. Captain Fisher, if I understood your testimony when you resumed on the stand here today after we had the other witness, you said that you had seen chocks being used at Georgetown in connection with the various hatches that were being loaded, is that correct?

A. Yes.

Q. And that included hatch No. 3, is that right?

A. Yes.

Q. And you said in answer to a question of Mr. Behrens, that when you looked down from the top when the rolls are entirely in the hatch, you couldn't see it because everything would be covered up, you couldn't see the wedges for that reason?

A. You couldn't see if every roll was chocked, that is right. You couldn't see if they had put a chock under each roll.

Q. During the loading of this vessel were you actually down in hatch No. 3 of the lower hold, along with the other holds?

A. I imagine so, because I went from one hatch to another.

Q. At the time that you were down in the lower hold of hatch No. 3, when this was being loaded, did you see how the lower tier was being placed in?

A. I cannot say definitely, but I can say if it wasn't being put in properly I probably would have complained to the stevedore.

[fol. 285] Q. So far as you knew on the basis of what you saw, on the very bottom tier, that is on the floor, the rolls were put in to your satisfaction?

A. They must have been, yes, sir.

Q. By the way, what was your purpose in being in hatch No. 3 in the lower hold at the time of the accident?

A. Well, there were several reasons for being there: One is to see that the cargo is not damaged, or if it was damaged

to make an exception on it as the claims department requires an exception being made on damaged cargo. And at the port of discharge, then that was the primary reason for my being there. I was primarily concerned to check the damage or the pilferage or any unsafe method or practice.

Q. Was that also the reason for your being down in the lower hold of No. 3 at the point of loading?

A. Yes.

Q. The same reasons you are there, to see that everything is properly done.

A. That is right.

Q. In your opinion, is that right?

A. Yes.

Q. On both ends?

A. Yes.

Q. At the loading in Georgetown and at the point of discharge was everything as far as you were concerned done properly by the Ryan Stevedoring Company?

A. As far as I was concerned, yes.

Q. One of your purposes and functions as cargo mate is to determine whether the thing is being loaded to your satisfaction, is that right?

A. Yes, where they are loading.

Q. And if you see anything wrong, you put in a complaint to the hatch boss or to the pier superintendent of the stevedores, is that right?

A. That is right.

Q. There were no complaints on this particular loading, were there?

A. Not as far as I remember.

Q. Do you remember testifying at Mr. Frank's office and being asked this question and having given this answer back in August, 1951, August 21st. I am reading from page [fol. 286] 29, about seven lines up from the bottom. This is a question by Mr. Frank:

"Q. Were you in No. 2 hatch in the lower hold when they were loading this particular lower hold, loading in Georgetown?

"A. You mean No. 3.

"Q. No. 3 I meant. I am sorry.

"A. Yes.

"Q. All the time?

"A. Not all the time, no.

"Q. Did you see anybody put dunnage there instead of using the wooden chocks?

"A. No, sir.

"Q. If you had you would have stopped them?

"A. I would have tried to."

Do you remember giving those answers to those various questions that I have just read?

A. I recall something like that, I think; if it is in my deposition it must be correct.

Q. Were they true then when you gave the answers before in 1951 which I have just read?

A. To the best of my knowledge, yes.

Q. And are they true today as you sit here on the stand?

A. Yes.

Mr. Schwartz: I have no further questions.

Redirect examination.

By Mr. Behrens:

Q. I have just one question to straighten something out.

The Court: Go ahead.

Q. How long after this accident do you remember, were you on the Canton Victory, roughly? Was it until about three years ago, would you say?

A. No, after the accident I can't recall just exactly how long it was, but then they took that ship out of service and they put another one in its place.

Q. Which vessel was put in in her place?

A. The Azalea City.

[fol. 287] Q. Have you sailed the Azalea City ever since that time right down until today?

A. Yes.

Q. And you have served aboard her as chief officer, have you not?

A. Yes.

Q. You got off the Azalea City on Tuesday or Wednesday of last week at my request; is that right?

A. Yes.

Q. In other words, in the last four or five years the only

two vessels you have sailed on were the Canton Victory and the Azalea City?

A. That is correct.

Recross-examination.

By Mr. Frank:

Q. Does the Azalea City come in to this pier——

A. Yes.

Q. That we have been talking about?

A. Yes.

Q. From Georgetown?

A. Yes.

Q. With paper?

A. Yes.

Q. With this same type of pulp I mean?

A. Yes.

Q. Do you use the flooring system or the chine system?

A. We use the chine system, with the exception of special cases which I have previously mentioned.

Q. Do you come in today with the Azalea City with the flooring off system?

A. Well, we make a trip every two weeks.

Q. Yes. And in the past three years or four years if I have had special occasion to use it, which occasionally we have, but I can't recall just what particular trip it might have been.

Mr. Frank: All right, that is all.

The Court: Now we will take a recess until half past 2.

(Recess taken until 2:30 o'clock P. M.)

[fol. 288] Afternoon session.

Mr. Behrens: Shall I proceed, your Honor?

The Court: Yes, sir.

Mr. Behrens: Mr. Frank has just informed me he would like to ask a further question of the last witness.

Mr. Frank: Just one thing, your Honor.

DON MILLER FISHER, recalled.

Cross-examination (continued).

By Mr. Frank:

Q. Mr. Fisher, when you came down hatch No. 3, did you go down the aft ladder or the forward ladder?

A. I can't remember which ladder.

Q. You don't know which ladder you used?

A. No, sir.

Q. But you would go down either the forward or the aft ladder, that is the only way you could go down?

A. No, sir, I think there is an escape hatch in the mast houses in those Victory ships.

Q. But you don't remember which one you used?

A. I don't remember how I went down.

Mr. Frank: I think that is all.

Mr. Behrens: I have no further questions.

(Witness excused.)

[fol. 289] Cecil Foltz, called as a witness on behalf of the defendant, Pan-Atlantic Steamship, having been duly sworn, testified as follows:

Direct examination.

By Mr. Behrens:

Q. You are a master mariner, are you not, Captain?

A. Yes, sir.

Q. As I understand it, as a stevedore you have handled pulp or newsprint during the last several years, have you?

A. Yes, sir.

Q. Would you describe to the jury your general experience and also your particular experience with pulp or rolls of paper.

A. Well, as vice president of the Terminal Stevedoring Company, we discharge approximately 70,000-tons per year for the last two years, and previously to that I handled about 100,000 tons per year for six years with the Moore-McCormack running to South America.

Q. Have you ever sailed a cargo of this type, Captain?

A. Yes, with Moore-McCormack; I was master with them.

Q. How long have you been licensed as a master of ocean-going vessels?

A. Eleven years.

Q. Now, in discharging vessels as a stevedore, more particularly with reference to this pulp, have you noticed any usual and customary method of stowing cargo of that kind?

A. Yes, I would say that the most usual and customary, as has been referred in this court here, is the chine method. I would say it is the safest for the ship, safest for the men; however, on occasions you will stow it by laying sectional floors, such as have been described. Occasionally, also, it is also stowed on end, which hasn't been mentioned, that is, putting the rolls of paper upright rather than down.

Q. Now on the basis of your experience, which you have outlined to us, would you say the chine method is the usual and customary method?

A. Yes, sir.

[fol. 290] Q. In your opinion, is it more safe or less safe than any other method you have seen?

A. You mean in regard to the ship or the personnel?

Q. Let us say with reference to the ship, first.

A. Well, with reference to the ship, it is definitely more safer because it creates a solid mass of cargo rather than a mass that could move with those boards in between.

Q. What about safety to the cargo?

A. Safety to the cargo is, I would say, well, it might be safer for the cargo to load it with board skids.

Q. What about the safety of the men, what about the men who handle it?

A. I would say it is about even. It would depend on the attention that the men give to the cargo that they are taking out. I would say that they are both the same, that is in the flooring off or in creating those platforms or the heading method with the chine method.

Q. Then, insofar as safety to the men is concerned, those would all be roughly equal?

A. Yes, sir.

Mr. Behrens: You may inquire.

Mr. Frank: No questions.

Mr. Behrens: That is the case for the defendant Pan-Atlantic, your Honor.

I have certain legal matters I should like to discuss with your Honor at this stage, without the presence of the jury.

Mr. Frank: Do you want me to put in my rebuttal now?

Mr. Behrens: I think we had first better make the motion.

The Court: Then we will excuse the jury while you are doing that.

Will the jury please step outside.

(The jury left the courtroom.)

COLLOQUY

The Court: You are not going to put in anything, are you?

[fol. 291] Mr. Schwartz: I think we have run into a slight mechanical problem, your Honor.

As I understand it, sir, the statements which have been transcribed and the concessions which were made in your Honor's chambers, those are not part of the record at this moment. I think that insofar as several matters are referred to in that transcript, they would of necessity have to be deemed incorporated.

Should I actually read them into this record now, so that the full record will be before your Honor

The Court: As I understand it, Mr. Frank hasn't put in any rebuttal, yet.

Mr. Schwartz: If your Honor pleases, it is time for Mr. Behrens to make whatever motion he wants to and then for me to put in my case.

Mr. Behrens: In other words, one of the motions I want to make at this stage is to incorporate in this record the transcript of what transpired before your Honor on January 15, 1953—I am sorry, I have the wrong one here, I meant February 3, 1953.

At that time, your Honor, we made certain stipulations by and among counsel in lieu of a pretrial order, and I think that what was transcribed at that time should be a part of the record here, just as the pretrial order would have been if we had had a pretrial order. That is necessary, your Honor, among other reasons because of stipulations affecting my rights against Ryan Stevedoring.

The Court: That is right.

Mr. Frank: May I make my position very clear. In other words, do I understand you correctly, Mr. Behrens, what you want to do is to make sure that the transcript of record of what took place before your Honor on the continued pre-[fol. 292] trial conference, that you want that made part of this record, and that is what you are asking?

Mr. Behrens: Yes.

Mr. Frank: May I make my position clear?

I have no objection, providing one thing, and that is that neither counsel should refer to the question of compensation, which is going to be left to your Honor to determine if the plaintiff gets a verdict.

In other words, what my particular point is is that I have no objection to having the entire record, but neither counsel on either side is to refer to the compensation feature of this case because that, under the agreement, has been left as a question for you to determine if plaintiff gets a verdict.

With that exception, your Honor, I will let it go in.

The Court: It has been my opinion, subject to change by counsel who may disagree with me, that this issue should go to the jury as an issue between the plaintiff and the steamship corporation.

Mr. Frank: Correct, sir.

The Court: We want to avoid the situation where some juryman might say, why didn't they sue the stevedore company. Now, we don't want that in this case.

Mr. Frank: That is right.

The Court: We have a plain issue——

Mr. Frank: Of negligence.

The Court: —of alleged negligence on the part of Pan-Atlantic or seaworthiness.

Mr. Frank: That is all there is, and no other issue, your Honor.

[fol. 293] The Court: I had already made up my mind to charge the jury that that was the issue.

Mr. Frank: Correct. I agree entirely, your Honor.

The Court: I don't want in summation someone to get a little enthusiastic and talk about compensation.

Mr. Frank: That is the point that I made. Otherwise,

your Honor, I have no objection to the entire record going into evidence.

The Court: If the verdict is for the plaintiff against Pan-Atlantic, then we will come to the question of the lien, or whatever you want to call it, of the compensation.

Mr. Frank: In other words, your Honor, I don't want any one of us to become, as your Honor said, enthusiastic, and then that may lead to a mistrial.

The Court: I think it would.

Mr. Behrens: I am not going to let anybody dampen my enthusiasm; however, I shall not refer to compensation in my summation. I do want to make it perfectly clear that I feel free to put all the blame upon Ryan, as I have a mind to put it in my summation.

The Court: I am not talking about that. Not only that, you can say that you had a safe place to work and that you had seaworthiness.

Mr. Schwartz: I am only concerned that pages 22 and 23 of this transcript of the pretrial hearing had before your Honor on February 3, 1953, be made part of the record.

Now, despite the fact that the decision of the right over has been reserved to your Honor as a question of law and fact, as I understand it; Mr. Behrens has given Mr. Frank [fol. 294] his word that despite these provisions being in the record, he will not, in his summation, refer to the particular one that Mr. Frank is fearful of. Your Honor, I don't know what there is now which can possibly be objectionable about this entire transcript being made part of the record.

The Court: I would say that counsel has a perfect right, that is counsel representing the steamship company, to say, why, we had everything that is possible for safety in there, there isn't any liability on us, the ship was as safe as could be, and if they want to go off, despite our facilities, then they are the ones who are to be blamed.

Mr. Behrens: My understanding here, your Honor, and I have just told Mr. Frank and I will repeat it again, let me say that I have no intention and I shall not refer to compensation in my summation to the jury, not as to the fact of compensation or the amount.

The Court: And you may blame the stevedoring company all you want.

Mr. Behrens: I intend to do that, sir.

Mr. Schwartz: Of course, your Honor, acquiescence on my part does not mean consent, that is as to whether the stevedoring company was at all responsible.

Mr. Frank: You don't intend to say it was.

Mr. Schwartz: No, there is no question about that.

The Court: This is my intention. It is my intention to inform the jury that this issue is solely between the plaintiff and the steamship company.

Mr. Frank: I acquiesce entirely, that was my position. I just don't want any mistrial.

The Court: And, of course, that won't interfere at all with counsel for the steamship company showing very [fol. 295] plainly that it was somebody else's fault.

Mr. Behrens: Do I take it, your Honor, that so much of the record as took place before your Honor is now part of this record?

The Court: Counsel has told us that they will not take part; let us take it all in.

Mr. Schwartz: Yes, as being part of the evidence.

The Court: Yes, take it in as being part of the record. You will all join in that.

Mr. Behrens: The next problem which I have, your Honor, is this: The relative right as between Pan-Atlantic and Ryan, assuming a verdict for the plaintiff, is then to be determined by your Honor under our agreement.

The Court: That is right.

Mr. Behrens: This right of indemnity alleged by Pan-Atlantic is a right of common-law indemnity rather than a contractual provision. My question is how to get such facts before your Honor.

Your Honor, there was a motion for summary judgment in this case by Ryan, to which was annexed the exchange of correspondence between Ryan and Pan-Atlantic, which is a contract.

Now, the question is whether those documents should now be put in evidence before your Honor, or whether your Honor will infer from the absence of any proof on the subject that there was no contractual indemnity.

Mr. Schwartz: I think we can agree and stipulate between us that whatever contractual arrangement was made be-

tween Pan-Atlantic and Ryan, did not contain any expressed provision for indemnity, and it is Mr. Behrens' position in [fol. 296] this matter that his claim over is based solely upon an implied right of indemnity, as implied in law.

Mr. Behrens: That is correct.

Mr. Schwartz: And I think we can stipulate that under an arrangement Ryan loaded the vessel and discharged the vessel at the various ports that have been talked about here, and I think by virtue of the fact that that transcript is now deemed in evidence, and part of it was contained in Mr. Frank's statement that we loaded at Georgetown, so I think it is a duplication.

The Court: Let me put it this way: If they bring in a verdict for defendant, then I have no problem. If they bring in a verdict for plaintiff, we have already arranged that the question on the lien can be adjusted, and so forth. Now, then, there exists an application or there will exist which will be made by the steamship company for a decision by the Court as to how much of the burden it should bear.

Mr. Schwartz: As I understand it, after the jury has disposed of the only question before them, to wit, Pan-Atlantic's liability, if any, to this plaintiff, then if they bring in a verdit for plaintiff as against defendant, your Honor will grant Mr. Behrens and myself time to submit whatever briefs we think are necessary to your Honor on the question of the right over as between Pan-Atlantic and myself.

The Court: I am perfectly willing to do that.

Mr. Behrens: My point now, if that happens, your Honor, then by stipulation you are to find the facts as between Pan-Atlantic and Ryan, and I want to be sure that your Honor has the facts before you because we have stipulated we [fol. 297] would not try this issue piecemeal, that we would put it all in, all the evidence.

The Court: Can't we put it this way: First, that you agree with me that the issue to be submitted to the jury shall be between the plaintiff and the steamship company.

Mr. Behrens: I agree with that.

The Court: In summation and so forth, no question will be raised about compensation or anything of that kind, nor

this question about this other steamship company, Waterman.

Mr. Frank: They are out.

The Court: Yes, they are out.

Now, that being so, if the verdict be for the defendant, our troubles are over that way.

Mr. Frank: Only my troubles are in there.

The Court: If the verdict be for the plaintiff, we will arrange the question of the lien in a satisfactory manner because you have agreed on the amount of that, and that as to the other question, I will grant it in the absence of the jury, that is an application by the steamship company to present its equity issue, and I will hear both sides.

Mr. Schwartz: We are adducing all of our proof now so there will be nothing to adduce afterward.

The Court: You want me to make findings of fact different than the jury's?

Mr. Behrens: Your Honor will have a finding of fact to make which the jury will not have to make, and that is why I want to be sure that the record before your Honor contains the information upon which you can base that finding.

The Court: You mean to give you a chance to introduce your correspondence.

[fol. 298] Mr. Behrens: The question is whether that should be done now or whether it should be done later.

Mr. Frank: I don't see what that has to do with this issue.

The Court: You haven't waived any rights by going to the jury on this issue.

Mr. Behrens: I did in this respect: I understand the stipulation among counsel to be that in this one trial before your Honor, that counsel will submit in their case to the jury all proof, whether it affects Mr. Frank's client's rights against my client's, or my client's rights against Mr. Schwartz's client, no matter who it might affect or how, all of the evidence concerning anything of these problems, that is, all the evidence would be here before the jury or before your Honor, and that is why I am disturbed.

The Court: I will clear that up. In other words, the only thing the jury here is interested in is in this issue that will be submitted to them between the plaintiff and the

steamship company. Now, once that is done and they bring in their verdict, all this about compensation and so forth, all this about granting your right to have some kind of indemnity agreement that you claim existed, all those things can be brought to my attention and submitted to me and the jury won't decide those things.

Mr. Schwartz: Your Honor, I don't know whether I can read Mr. Behrens' mind, but in view of the fact that there is no express written contract of indemnity between his client and my client, the only thing that your Honor has for determination is the claim of indemnity over as implied in law, if it exists at all. Now, I don't know if there is any contract as such which helps your Honor. I assume that [fol. 299] Mr. Behrens need only have for the record a status existing as between Ryan and Pan-Atlantic, from which your Honor might possibly conclude is an agreement and that there is indemnity over. Now the status that can only exist here is that we contracted with them and I am talking about Ryan with Pan-Atlantic to load their vessels and to discharge their vessels.

Now what more Mr. Behrens wants I don't know but if there is any question about there being proof here after the jury has determined the plaintiff's right to recover against Pan-Atlantic, then I will not agree to submit that to your Honor as a matter of fact and law beacuse then I will be trying my case piecemeal, and I don't want to do that. I don't know what Mr. Behrens wants.

The Court: In case of an adverse verdict against Pan-Atlantic, would they bring suit against Ryan? Is that what——

Mr. Behrens: Your Honor, we have that suit pending here.

Mr. Schwartz: They have impleaded us.

What is it you want to say that the correspondence adds anything to?

Mr. Behrens: Let me start again. For the moment, Mr. Schwartz, assume a verdict for the plaintiff in this case. Now, then your Honor will be called upon to determine whether my client is entitled to that indemnity for which they have pleaded against Ryan in this case. Now, the Court would say, what arrangements do you have between

you. We have already stipulated that your client loaded the vessel and your client discharged the vessel. Now, your Honor says to me did you have anything in your contract with Ryan expressly providing for indemnity. I say no, and he says show me in the record where it is, and there [fol. 300] is nothing in the record.

Mr. Schwartz: Can't you stipulate that?

Mr. Behrens: I certainly can, if that is satisfactory to your Honor, and if you will just stipulate——

Mr. Schwartz: I will stipulate that there is no contractual provision for indemnity.

Mr. Behrens: And I will so stipulate, if that is satisfactory to your Honor.

The Court: Very well.

Mr. Behrens: Then your Honor can make a finding on that stipulation.

Mr. Schwartz: Now we have got that cleared up.

Mr. Behrens: Yes, we have got that cleared up.

The next question that arises, your Honer, has to do with the question of pleading. This case was started in the State Court, in the Supreme Court of Kings County, and was removed to this court. It was pleaded in paragraph 5 of the complaint that "While the plaintiff was at work in the hold of the vessel, suddenly, without any fault on his part, and wholly and solely through the careless negligence of the defendants * * *" etc. In other words, this complaint was drawn on the usual law of the State of New York that the plaintiff has the burden of proving freedom from contributory negligence.

Your Honor, we deny that allegation of the complaint. Now we are here, and there comes the question of how or the necessity, rather, of my amending my answer to plead contributory negligence as a partial defense because we are in this court. In other words, whether we are to apply [fol. 301] the maritime rule of comparative negligence in this case, or whether we are going to go on the theory pleaded here of the law of New York where contributory negligence is a complete defense. I should like to have that matter determined at this stage so that I may move to amend my pleadings lest I be barred in some way at the time your Honor instructs the jury.

In order to protect my position, I would ask your Honor's leave to amend my answer to plead as follows:

As and for a first separate and partial defense, the defendant, Pan-Atlantic Steamship Corporation, alleges upon information and belief, paragraph 8, that if the plaintiff sustained injuries as alleged in the complaint, which the defendant denies, and if the injury to the plaintiff was caused by any negligence, carelessness or recklessness on the part of the defendant, which the defendant also expressly denies, then the defendant alleges that the injuries were sustained in part by the carelessness and negligence of the plaintiff.

I ask your Honor for leave——

The Court: In other words, that he cannot get full damage, but will be reduced by the amount of negligence that they show he is guilty of.

Mr. Behrens: Yes, your Honor.

The Court: That is the same as the Jones Act, but this isn't the Jones Act.

Mr. Behrens: That is correct.

The Court: You are under the law of the sea, which is comparative negligence.

How about that?

Mr. Frank: I have no objection.

Mr. Schwartz: No objection, sir.

[fol. 302] The Court: There is no objection.

You want me to charge the jury accordingly.

Mr. Behrens: I shall, yes, your Honor.

The Court: All right.

Mr. Frank: All right, it is all right with me. We will make it the law of the case right here.

The Court: Very well.

What is the next point?

Mr. Behrens: At this time, your Honor, I will renew the motions that I made at the end of plaintiff's case.

The Court: Those motions are denied, and I will give each of you an exception; Mr. Schwartz gets his too.

Mr. Schwartz: At this point, your Honor, I assume that Mr. Behrens has rested on behalf of the defendant.

Mr. Behrens: That is correct.

Mr. Schwartz: At this time, your Honor, I think it is incumbent upon me to put whatever I have into the record. However, I don't have anything, so I would like the record to indicate that the third-party defendant rests.

I appreciate that your Honor has reserved to himself the question of the right over, so that the record will be complete, I assume your Honor will accordingly reserve decision on the motion that I would now like to make for the purpose of the record, and that is to dismiss the third-party complaint as a matter of law and fact on the basis of all of the arguments which will be made to your Honor hereafter. I should like the record to indicate that I have made my motion, although I appreciate that your Honor will reserve decision.

[fol. 303] The Court: I reserve decision, but it is also understood that on the question of the lien——

Mr. Schwartz: I think your Honor has allowed the plaintiff to induce into his part of the case the amount of the medical expense, which figure is $9,000-odd and——

The Court: As long as that is understood.

Mr. Frank: Yes, your Honor, that is understood.

Mr. Schwartz: There is no question about a lien here any longer.

The Court: All right.

Mr. Behrens: In order to complete that phase of the case concerning which Mr. Schwartz has just referred, that is the rights of Pan-Atlantic against Ryan, I would also move for a directed verdict in behalf of Pan-Atlantic.

Since your Honor is to act as a jury, I want to move for a directed verdict on the weight of the evidence.

Mr. Schwartz: I don't know how it is proper, in view of the fact that your Honor is the jury for the purpose of this right over, how we can move for a directed verdict, that is where your Honor will render the verdict, I don't know how that can be done, but to complete the record, I will move for a directed verdict on behalf of the third-party defendant.

The Court: Well, we will reserve decision until the jury decides this case, and then we will refresh our memory.

All right, bring back the jury.

(The jury took its place in the jury box.)

[fol. 304]. ANTHONY D'AMICO, called as a witness in rebuttal by the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Frank:

Q. On the day of the accident, what was your job for Ryan Stevedoring?

A. Hatch foreman, hatch boss.

Q. On what hatch?

A. No. 3, aft.

Q. Is that the hatch where the accident occurred?

A. That is correct.

Q. Did you see the accident?

A. No, sir.

Q. Where were you at the time?

A. I don't know whether I was on deck or on the dock, I don't know.

Q. In other words, your work brings you both on the ship as well as on the dock?

A. And the hold.

Q. And in the hold. But at the time of the accident you don't know whether you were on the ship or on the dock?

A. That is correct.

Q. What attracted your attention to the accident?

A. I heard the screaming.

Q. Where did you go?

A. I went right on deck, looked down in the hatch.

Q. Did you go into the hatch afterwards?

A. No, sir.

Q. I mean after the man was taken away.

A. After the man was taken away, yes.

Q. That is what I am talking about. Were you down in the hatch before the accident, long before?

A. Yes, sir.

Q. Do you go down there from time to time?

A. Yes, sir.

Q. I want you to tell his Honor and the jury, underneath, holding together these piles of paper, what type of chocks were there down there?

A. Dunnage.

Q. Did you see any wedges?

A. No, sir.

Q. Now, at the time of the accident, it is agreed that what they call the chine system was used down there. Do you [fol. 305] know what we mean by the chine system?

A. No.

Q. Well, the tier system. What do you call it, belly-to-belly?

A. Belly-to-belly, yes sir.

Q. Now, since the accident, is that how all the ships have been coming in——

Mr. Behrens: I object to that as irrelevant, if your Honor pleases.

Mr. Frank: Let me state to your Honor my position purely on the question of credibility of the witness Fisher, who said that after the accident——

The Court: No, no.

Mr. Frank: If your Honor says no, then I shall not pursue it.

The Court: That is right.

Now, wait a minute. You said you saw dunnage?

The Witness: Yes, your Honor.

The Court: What did it look like? What was it?

The Witness: Just like when they put the floor dunnage on the bottom, there was a regular flooring dunnage——

The Court: What was it; timber, wood?

The Witness: Wood, just half-inch or three-quarters inch.

The Court: About half an inch?

The Witness: Yes, just regular, plain dunnage.

The Court: In pieces about how long?

The Witness: Oh, it is all sizes, it could be fifteen feet, it could be, ten, it could be six or four.

The Court: And that is what you saw there?

The Witness: That is right.

The Court: Did you see any wedges?

The Witness: No, sir.

The Court: And that was right after the accident?

The Witness: Well, I went down before the accident.

[fol. 306] The Court: You are talking about before the accident?

The Witness: Before the accident and after the accident because that is my job, to go down the hold and come up and watch the cargo and watch the men.

The Court: How long before?

The Witness: Before the accident, I will figure about a half hour before the accident, anyway.

By Mr. Frank:

Q. Mr. D'Amico, were you here last week?

A. Yes, sir.

Q. And were you brought down by Ryan Stevedoring?

A. I don't know who subpoenaed me, I don't know who the man was who subpoenaed me.

Q. Were you the only man, or were there a lot of men?

A. About five or six of us.

Q. You were brought down, and you were in some room over there on the other side of the hall?

A. That is right.

Q. Did they talk to you——

Mr. Behrens: I object to this. The relevancy and materiality is beyond me.

Q. Let me ask you this way: After they brought you down one day, did they send you all back again?

A. They sent us home.

Mr. Frank: That is all.

Cross-examination.

By Mr. Behrems:

Q. Mr. D'Amico, is it or is it not the fact that as you discharged cargo of pulp from the hold of a vessel like the Canton Victory, that the conditions down there change from time to time; is that not so?

A. How could it change.

[fol. 307] Q. Well, when you open up the hatch to go down into the lower hold, it is all full of pulp, right?

A. That is right.

Q. Is that the condition that existed when Palazzolo was hurt?

A. Oh, no.

Q. The condition had changed?

A. That is right, it was cleared, the square was cleared. I figure when I went down the hold it was about ten, fifteen rolls down there, just like that, like that.

Q. You say when you went down after Mr. Palazzolo was hurt, you saw a different situation again?

A. Naturally, more pulp was out of the hatch.

Q. That is right. So that conditions change from time to time as you discharge it; isn't that so?

A. Well, naturally, the more pulp you take out, the less there is in the hold.

Q. Yes. Now, as long as you don't have the square of the hatch clear, as long as there are rolls of pulp over the whole square of the hatch, can any of the rolls on the bottom move around?

A. Oh, yes, they could move around.

Q. They can move around?

A. Well, if the square is clear, yes.

Q. I say when the square of the hatch is not clear.

Well, Mr. D'Amico, we will say now that your men have taken off down through the square of the hatch to the bottom layer.

A. Yes.

Q. At that point would that bottom layer, all in the square of the hatch, are those rolls going to move around?

A. No, they are not. They are chocked down.

Q. When you take those bottom rolls out of the square of the hatch, then something else can happen, isn't that so?

A. That is right.

Q. In other words, when that situation changes, then you have the possibility of the rolls moving around. That is true, isn't it?

A. That is right.

[fol. 308] Q. Now, when you came down there, you were the boss, weren't you, of these men?

A. That is right.

Q. You were Mr. Palazzolo's boss?

A. That is right.

Q. And all these other men back here?

A. That is right.

Q. You were the man in charge of these fellows?

A. That is right.

Q. And you worked for whom, who is your boss?

A. Ryan Stevedoring.

Q. Yes. Now, you say that when you came down there and the square of the hatch was almost clear, you saw some dunnage under the rolls; is that what you saw?

A. That is right, all over the hatch.

Q. You saw that?

A. Yes, sir.

Q. Now, what dunnage are you referring to? Are you referring to the dunnage that is down on the deck and the rolls are on top of that? Is that what you are talking about?

A. That is right, that dunnage, yes.

Q. You saw that dunnage where the rolls had been taken out?

A. Well, every time, riding on the bottom of the ship or any deck or anything there is a floor of dunnage, and it could be two high, three high, that is floor dunnage.

Q. And that is what you are telling us about, that dunnage?

A. That is right.

Q. You saw that dunnage?

A. Yes, just the plain dunnage.

Q. Now, when you were down there before the accident, after they had cleared most of the square of the hatch, did you see what was securing the bottom rolls?

A. Just dunnage.

Q. Now, this is another kind of dunnage?

A. No, no, the same dunnage.

Q. That was used as a sort of wedge, underneath, was it?

A. That is right.

[fol. 309] Q. Were you satisfied as the boss of these men that that dunnage was enough to hold the rolls back?

A. No, sir.

Q. What did you, as their boss, do to see that that condition was changed?

A. I told the men to watch their step and take care of them. In fact, they usually have a piece of 4 x 4 or 2 x 4 and as soon as a roll starts to roll because of a little list from the starboard side, they would roll down to the portside,

that they should shove the pieces of 4 x 4 or 6 x 6 or any kind of log, just throw it right in there to stop it right in the square.

Q. And you say you told the men to do that?

A. That is right, that is what they were doing.

Q. In other words, you didn't like the security of those rolls, so you told the men how you wanted it changed?

A. Right.

The Court: Did you see that they did that?

The Witness: They were doing it, your Honor, they were doing it for their own safety.

The Court: I see.

Mr. Frank: May I continue?

The Court: Yes.

Redirect examination.

By Mr. Frank:

Q. You told Mr. Behrens that those pieces of dunnage, that you didn't like them. Now why?

A. Because the rolls there weren't secure.

Q. They were not secure?

A. That is right.

Q. So you, not liking it, you told them to try to get a piece of what, 4 x 4?

A. Four by four or a 6 x 6, a piece of chock wood, something like that, something which would prevent them in case a roll——

Q. You mean when a roll started to roll, to prevent that?

A. Yes, to throw it in front.

[fol. 310] Q. Did you tell them to take pieces, and before the accident did you tell them to take pieces and remove the dunnage and put 4 x 4s in there?

A. Well, they should put a piece there to chock them.

Q. Well, before the accident and after you told them about those 4 x 4s, did you see other pieces of dunnage holding some of these piles?

A. No, sir.

Q. You didn't see some of these after the accident?

A. No.

Q. Did you see any wedges at all?
A. No wedges at all.

Mr. Frank: That is all.
Mr. Behrens: That is all I have. No further questions.

FRANK TRIMARCHI, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Frank:

Q. Frank, you were the winchman?
A. Yes.
Q. Of which gang?
A. No. 3 aft.
Q. That is the after gang?
A. Yes.
Q. Of No. 3 hatch?
A. Yes.
Q. That is the gang we have been talking about?
A. Yes.
Q. Did you see this accident happen?
A. No, sir.
Q. At the time of the accident, how did you learn of this accident?
A. Well, I was——
Q. Wait a minute. Let me just ask you a question. Did you hear any hollering?
A. Yes.
Q. When you are working your winch, you follow these rules up?
A. Yes.
[fol. 311] Q. Do you stand right at the coaming?
A. Yes.
Q. Is your lever right at the coaming?
A. Yes.
Q. When you heard the hollering what did you see?
A. Well, I saw the roll coming out from, just about the coaming, and go over to Mr. Palazzolo's leg——

Mr. Behrens: I object to this as improper rebuttal. This is the same testimony that we heard as part of the plaintiff's direct case.

Mr. Frank: No. If you will permit me I will show you how it is proper rebuttal, and that is he will testify that there was a draft being lifted at the time, and your witness said that there was not.

The Court: Go ahead.

Q. Let me ask you: What was your winch doing when you heard the hollering?

A. I was hoisting one roll.

Q. From where?

A. From the square, of course, No. 3 aft.

Q. And who had made fast particular roll?

A. Mr. Palazzolo and Louis Salvatore.

Q. Louis Salvatore was his partner?

A. Yes.

Q. At the time you heard the hollering how high up had you gotten with your draft?

A. Oh, about, I had just cleared, I would say, the lower deck.

Q. What did you do when you heard the hollering, and when you saw what you saw there?

A. Well, it was——

Q. What did you do is the question?

A. Common sense of course showed me to slow down a little bit.

Q. And then?

A. And then, of course, when I saw the fellow under the roll, I speeded up all the way as much as I could.

Q. Speeded up what?

A. Speeded the winch up.

Q. To what?

A. I speeded up the winch, to bring the roll over to the top of the deck, and to bring the roll onto the dock.

[fol. 312] Q. Did you land that roll on the dock?

A. Yes.

Q. Then what did you do?

A. Discharged the hooks, freed the hooks.

Q. And then?

A. Then I bring the hooks down into the hold, back into the hold and take the roll off Mr. Palazzolo's leg.

Q. While your winch and you were working at the lever doing the work of lifting the roll off of Palazzolo's leg, was it your winch?

A. Yes.

Q. What was your winch doing afterwards?

A. Brought down the platform.

Q. You brought down the platform?

A. Yes.

Q. Did you see at any time, let us say within ten or fifteen minutes before the accident, did you see the Mate Fisher go down your ladder?

A. No, sir.

Q. In order to get down your ladder what would you have to do, I mean the aft ladder what would you have to do?

A. Well, I would have to move a little for him to climb over the coaming there and get out to the ladder.

Q. In order to get down that after ladder a person would have to go over the coaming?

A. Yes.

Q. How high is that coaming on the Canton Victory ship?

A. I would say about three feet or more.

Q. When did you see the mate?

A. I saw the mate going down after I had discharged the hooks on the dock.

Q. You had what?

A. Discharged the hooks.

Q. The hooks?

A. Yes, we call them the dog hooks. In other words, those are the hooks that we pick up the paper with.

Q. Yes?

A. And I had discharged the hooks on the dock to bring the empty hooks down into the hold again, and as I was going down into the hold with the hooks I saw the mate go down.

[fol. 313] Q. Go down which ladder?

A. Go down the ladder where I was standing.

Q. Is that the after ladder?

A. Yes.

The Court: That was after the accident?
The Witness: Yes.
Mr. Frank: I think that is all.

Cross-examination.

By Mr. Behrens:

Q. You say that the mate was not down in the hold at the time of the accident?
A. Yes.
Q. I mean that is your testimony?
A. Yes.

Mr. Behrens: I have no further questions.

Louis Salvatore, recalled, having been previously sworn, testified as follows:

Direct examination.

By Mr. Frank:

Q. At the time of the accident did you see Fisher down below?
A. No, sir.
Q. You have known him a good many years?
A. Yes.
Q. When did you next see him?
A. It was after the accident when he came down.
Q. Did you have a talk with him at that time?
A. No, sir, not then.
Q. When did you have a talk with him?
A. I had a talk with him after they took Mr. Palazzolo to the hospital.
Q. Did he come to you and talk to you about the accident?
A. Yes.
Q. Did he ask you something about the gear?
A. Yes, he asked me if the ship's gear had anything to do with the accident.
[fol. 314] Q. What did you say?

A. I said no, it didn't, that the ship's gear had nothing to do with it.

Q. What did you mean by gear?

A. The winch, the bridles or anything else.

Q. Tell me this: After telling him that the winch or the gear, the bridles had nothing to do with the accident, what else did you tell him?

A. I told him that if them bottom rolls had wedges this accident would never have happened.

Mr. Frank: I think that is all.

Cross-examination.

By Mr. Behrens:

Q. Before this happened you saw that there were no wedges underneath the rolls according to your story, isn't that so?

A. That is right.

Q. You saw the conditions there, didn't you?

A. Yes.

Q. Did you at any time call them to the attention of your boss D'Amico?

A. That was nothing new to us——

Q. Just a minute. Did you call that to the attention of your boss, D'Amico?

A. I didn't have to. It was nothing new to us because they never used wedges.

Q. Was D'Amico down in your hatch that morning?

A. Yes.

Q. And he talked to you?

A. Yes.

Q. Did he tell you to go and get some 4 x 4s or 6 x 6s to use down there?

A. How could we go and get them? You have to find them.

Q. Did he tell you to go and find them?

A. Yes, if you can find them.

Q. Did he tell you to do that?

A. Yes, if you can find them.

Q. And that was your boss, D'Amico, that told you to go and get the 4 x 4s or 6 x 6s, and place them underneath these rolls?

A. If we could find we would get them.

[fol. 315] If you could find them, but did he tell you to go and get them?

A. If we could find them to use them.

Q. But you say on this day he told you to go and try to find them, is that right?

A. Yes.

Mr. Behrens: I have no further questions.

Redirect examination.

By Mr. Frank:

Q. Did you find them?

A. No.

The Court: He didn't stop you from going ahead with this dunnage, did he?

The Witness: Beg pardon?

The Court: He didn't tell you to stop until you found them, did he?

The Witness: No. You have to find the 4 x 4s or 6 x 6s in order to use them, and you don't find them every place.

The Court: In the meantime you went ahead with your work?

The Witness: We did the work.

The Court: With dunnage?

The Witness: Yes, you just don't hang up the hook, the bosses don't want to know that, they want to know that the work has to go forward.

The Court: You continued with the work after that?

The Witness: Yes.

The Court: Now, did you go up and look for some 4 x 4s or 6 x 6s?

The Witness: One of the fellows did.

The Court: Who did?

The Witness: One of the boys that worked with us.

The Court: Did he find them?

The Witness: He didn't find anything.

[fol. 316] The Court: That is all then.

Mr. Behrens: That is the defendants' case.

The Court: Is that all? Do all parties rest?

Mr. Behrens: Yes.

The Court: I am going to let the jury go then at this time, if you want to make your motions.

Mr. Behrens: Yes, your Honor.

The Court: All right. It is now half past 3, and I think you members of the jury would rather come back tomorrow morning and then we will have the summations and the charge, so you will be able to get right down to deciding this case tomorrow morning rather than waiting here for motions or other things now. So you are excused until tomorrow morning at 10:30, and come back here then and hear the lawyers and my charge, and you will then decide the case.

(The jury leaves the courtroom.)

MOTIONS

Mr. Behrens: In behalf of the defendant Pan-Atlantic Steamship Corporation, I should like to renew all of the motions I made at the end of the plaintiff's case and at the end of my case.

The Court: Yes. There are one or two on which I am reserving, are there not?

Mr. Schwartz: I am concurring with Mr. Behrens in the motion he makes which are directed to the plaintiff's case.

Mr. Frank: Not between them. Those your Honor has denied, and you are only reserving on this controversy between them as I understand it.

The Court: Is that it? I want to be sure.

Mr. Behrens: If there is any question suppose I make my motions seriatim.

The Court: Yes, I would like to hear your motions.

Mr. Behrens: First, I move to dismiss the plaintiff's complaint on the ground that the plaintiff has not produced [fol. 317] facts which make out a prima facie case for the plaintiff. This is my first motion.

The Court: That motion is denied and I give you an exception.

Mr. Behrens: The second motion is for a directed verdict in behalf of the defendant Pan-Atlantic Steamship Corporation against the plaintiff.

The Court: Yes, that is denied and I give you an exception.

Mr. Behrens: And the third motion is for a directed verdict against Ryan Stevedoring on my third-party complaint against Ryan.

The Court: Well, now, you want me to reserve on that?

Mr. Behrens: I would assume your Honor would reserve decision on that.

The Court: I will reserve that.

Mr. Schwartz: In order to keep the record straight Ryan Stevedoring Company concurs in the first two motions, to wit, the motions directed in favor of the defendant to dismiss the plaintiff's complaint, and also for a direction of verdict as against the plaintiff.

The Court: And each of them are denied with an exception to you.

Mr. Schwartz: And I also move on behalf of the third-party defendant to dismiss the third-party plaintiff's complaint, and for a direction of verdict in favor of the third-party defendant against the third-party plaintiff.

The Court: I will reserve on that.

(Adjourned to Tuesday, February 10, 1953, at 10:30 o'clock A. M.)

[fol. 318] Trial continued.

Mr. Behrens: I would assume in the ordinary course of events, counsel for Ryan will sum up to the jury first.

Mr. Schwartz: I will waive any summation to the jury.

Mr. Behrens: Then may I proceed?

The Court: Yes.

(Mr. Behrens sums up to the jury on behalf of Pan-Atlantic Steamship Company.)

(Mr. Frank sums up to the jury on behalf of the plaintiff.)

CHARGE OF THE COURT

The Court: Mr. Foreman, members of the jury: This case now comes to you for your verdict. At the outset, throughout the days that you have listened to the witnesses

I have been impressed by the ability of the lawyers for both parties, and their fairness exercised to the Court and between themselves; and also your really careful attention which has been very satisfying to the Court.

It is important that you remember and understand that you are the sole judges of the facts. There have been quite a number of witnesses here for you to consider, with their testimony. What is the truth? That is for you to decide. [fol. 319] You have listened to the testimony, and it is your recollection of it that controls. What the Court has from time to time said or may say in this charge as to the facts, or what counsel has said during the trial or in addressing you, is not to be taken in place of your own recollection. Nor does the denial of the motions or rulings on evidence by the Court indicate in any way that the Court has an opinion one way or the other in this case. What the facts are is solely for you to determine, and you alone. The law is given to you by the Court, and you will follow that law and apply it to the facts as you shall determine them to be.

You must not be influenced by sympathy or any other emotion.

The burden of proof is on this plaintiff to prove to you by a preponderance of evidence that the defendant was negligent, that the ship was unseaworthy, either or both. In the complaint which I have before me the plaintiff charges that on the 20th of July, 1949, while the plaintiff was at work in the hold of the vessel, which is the S.S. Canton Victory, of which the defendant Pan Atlantic Steamship Company was the charterer, suddenly and without any fault on his part, and wholly and solely through the carelessness and negligence of the defendants, their officers, crews, agents, servants and employees, a pile of rolls of pulp collapsed as a result of which one of them fell upon the plaintiff, as a result of which he sustained severe and permanent injuries. That the defendants, their officers, crews, agents, servants and employees caused, suffered and permitted the rolls of pulp to be loaded and transported in a reckless careless and negligent manner without being properly tiered, piled and secured, as a result of which one of the said piles was caused to collapse and strike the plaintiff. That the

defendants failed to furnish the plaintiff with a seaworthy vessel.

[fol. 320] Now, of course, that is denied by the defendant. And right here I want to call your attention to the fact that this issue is solely between the injured longshoreman or stevedore and the ship. Those are the two parties. That is the issue you will have to determine between them.

As I have said the plaintiff has the burden of proving to you by a fair preponderance of evidence that the defendant Steamship Company was negligent, and that the ship was unseaworthy.

By a preponderance of evidence is meant not necessarily the greater number of witnesses, but that amount of evidence which taken on the whole produces the stronger impression upon your minds, and satisfies you of its truth when weighed against evidence in opposition thereto.

You are the sole judges of the weight of the evidence, and the credibility of every witness. You are entitled to take into consideration therefore the demeanor of a witness, apparent intelligence, and opportunity of knowing or seeing the facts, their interest if any, and the probability of the truth of their testimony. All of these things, or lack of them, are to be considered by you in weighing the evidence.

If you find that any witness has intentionally testified falsely to a material matter you are at liberty to reject such witness's entire testimony, or accept such parts as you believe to be true.

The plaintiff is an interested witness as a matter of law. However, I again call your attention to the issues presented, which are that the plaintiff claims he was injured by the negligence of the defendant in not exercising reasonable care to furnish a safe place in which to work, and that the ship was unseaworthy by the way it was loaded. The plaintiff must prove that by a fair preponderance of evidence.

There have been witnesses on the stand who gave testimony in the nature of expert testimony. In considering [fol. 321] such testimony, and the weight to be attached to same, it is your duty to first consider whether the facts about which they have been asked to testify and give an opinion has been established by a fair preponderance of evidence. For such testimony has no probative value in case you

disagreed with the facts upon which such testimony is based. You are to be guided by expert testimony to such an extent as you decide is proper, bearing in mind that the reason for such testimony is because it is supposed to be based upon knowledge which an ordinary layman, because of inexperience, does not possess. Therefore, you should carefully consider such testimony in a common sense way, bearing in mind what you find to be the education, knowledge, the experience, the reputation of such witnesses.

The defendant, Pan Atlantic Steamship Corporation, was under a duty to plaintiff as a stevedore working on its ship, as an invitee, or business visitor, to provide a reasonably safe place for plaintiff in which to work; and to provide a seaworthy ship in which plaintiff, as a stevedore when unloading the cargo would work. As to this question of seaworthiness, it means that if a cargo is to be unloaded, and it had been loaded in a dangerous way, and it became dangerous to those unloading it without the presence of reasonably adequate and proper appliances, and these were not available so they could be used, this would make the ship unseaworthy. And the defendant in that event should at least have previously inspected and thereafter warned the plaintiff and the other stevedores who would be working of the danger. I believe certain witnesses have taken the stand and talked about that, that they did so. That is for you to decide; it is not for me as the Court to discuss witnesses' testimony. That is your sole prerogative. You have seen and heard each witness. [fol. 322] First, you must decide how the accident happened, and I mean that seriously. Second, what witnesses are telling the real truth as to the cause of the accident.

There has also been testimony as to the different methods of stowage, all of which is relevant. The Court allowed it to come in. You should consider those questions in deciding the issues presented to you. But if is not your duty to decide what, if any, method you prefer or that you think is better than another, for the reason that the issue presented to you for determination is whether the defendant used reasonable care to provide a safe place for the plaintiff in which to work, and whether the ship was seaworthy by reason of the facts that you find existed at the

time plaintiff was injured. Negligence is the failure to use reasonable care to provide a safe place in which plaintiff could work. Seaworthiness is a relative term; as has been well said a ship is an instrumentality of internal hazards, aggravated, if not created, by the uses to which she is put. Appliances and means furnished by the ship to be used when safety requires must be adequate and present for the purpose to which they are ordinarily used. And unsafe loading, and their inadequacy may support the conclusion that the vessel is unseaworthy.

If you find the Steamship Company did provide a safe place in which plaintiff could work, and a seaworthy ship, or if plaintiff has failed to prove to you by a preponderance of evidence that the Steamship Company was negligent and that the ship was unseaworthy, or if you decide that the ship company was neither negligent nor the ship was unseaworthy, that the whole cause of this unfortunate accident was the action of the stevedores, then of course in all of those three situations, your verdict should be for the defendant. You want to bear in mind that negligence is failure to use reasonable care, and seaworthiness is a term of the ship, of the sea, and the defendant gives to the plaintiff a warranty that the ship is safe. You will bear [fol. 323] those things in mind in connection with this burden of proof upon the plaintiff by a preponderance of evidence.

On the other hand, if plaintiff has proved to you by a preponderance of evidence that the steamship company did not provide a safe place in which to work, in other words, was negligent, or that the ship was unseaworthy and dangerous when it came to be unloaded in accordance with what I have defined, then you come to the question of damages.

On the question of damages, and before I get to that point I want to again state to you that you should give fair compensation, but you are not to forget your common sense. In other words, you want to be fair to the plaintiff and fair to the defendant. The plaintiff is not asking for charity. He has been seriously injured; you have seen it, there is no dispute about that. The defendant isn't asking to be relieved of any burden that the law imposes upon

it. It says, however, there was no such burden; it is not liable for anything under those circumstances, much as it regrets the injuries.

As to damages you will take into consideration in arriving at the amount of compensation, as you find from the evidence, the nature and extent of plaintiff's injuries, whether temporary or permanent in character, the bodily pain and mental suffering which he has endured, that he is reasonably certain hereafter to endure, the loss of his earnings as a result of the accident, the loss of his earnings in the future by virtue of a decreased capacity to earn money, his age, his vocation, his earning capacity prior to his injury, and the condition of his physical health prior to his injury, and the expense that he may be subjected to as a result of his injured condition as shown by the evidence.

The burden of proof of any contributory negligence is on the defendant. By contributory negligence is meant [fol. 324] that the plaintiff himself was negligent and contributed to bring about this injury. If you find that the defendant by a fair preponderance of evidence has proved such contributory negligence, and yet at the same time you find that the plaintiff has proved by a preponderance of evidence that the defendant ship is liable, or ship company is liable, then it is your duty to reduce the damages that otherwise you would give to the plaintiff. Contributory negligence in this case is not a bar to any recovery but on the contrary plaintiff's damages shall be diminished by you in proportion to the amount of negligence attributable to the plaintiff. In other words, plaintiff will then not recover full damages, but only that proportional share bearing the same relation to the full amount of compensation as the negligence attributable to defendant bears to the entire negligence attributable to both the plaintiff and the defendant. That depends on whether you find contributory negligence. If the defendant has failed to prove any, why, of course, you dismiss that from your consideration. And if there was no proof that you consider showing that he was contributorily negligent, why you dismiss it also and proceed to the amount that you would ordinarily

give under my charge to the plaintiff, if you find that liability for that has been proved.

There is one other thing. At this point the parties usually present requests to charge, and at the request of counsel for the plaintiff I do charge No. 5 as follows:

"While the jury has a right to reduce any verdict that the plaintiff is entitled to by the amount of contributory negligence that he himself was guilty of, that contributory negligence must be properly proved. Just like there is no presumption of negligence on the part of the defendant there is no presumption of negligence on the part of the plaintiff, and if there is no proof of contributory negligence on the part of the plaintiff, then the jury has no right to diminish the verdict that he is entitled to.

[fol. 325] "In order for the jury to apply the comparative rule of contributory negligence, they must find that the plaintiff himself did something that brought about the accident. If any of his fellow employees in connection with their work was negligent, that is not imputable to the plaintiff."

" Requests to Charge and Exceptions

The rest of the requests of counsel for the plaintiff I refused, which have not been included in the charge.

And the requests of the defendants I think I have already charged in substance as requested, except No. 1. I will not charge further than I have charged with respect to that, and I will give you an exception, but as to No. 2, don't you think I have charged sufficiently?

Mr. Behrens: I think that your Honor has charged exactly to the contrary of what I have requested in No. 2.

The Court: Oh, yes, I refuse to charge that.

Mr. Behrens: May I have an exception?

The Court: Oh, certainly, that is right.

Mr. Frank: And I presume that I may have an exception on those requests of mine that your Honor has declined to charge?

The Court: Oh, yes, certainly.

Now, are there any other requests or exceptions?

Mr. Behrens: Yes, I have certain requests and exceptions. Has Mr. Frank?

Mr. Frank: I do not know at this time.

The Court: Do you want the jury excused while you are going through this?

Mr. Behrens: That is a matter for your Honor to determine. It will take but a moment.

The Court: Then you may proceed.

Mr. Behrens: Your Honor explained to the jury three possibilities, any one of which your Honor said would lead to exoneration of the defendant.

The Court: That is right.

[fol. 326] Mr. Behrens: Failure to prove negligence, failure to prove unseaworthiness, or prove that the real trouble was caused by the stevedores. I would like to call your Honor's attention to a fourth possibility, wherein the jury is not satisfied as to just exactly what did happen, under such circumstances the defendant would be exonerated.

The Court: Certainly, that is right, if they can't make up their minds as to what occurred.

Mr. Behrens: Your Honor did not tell the jury that by your Honor's giving instructions on the question of damages, you did not intend to indicate any feeling on your part concerning the case, and also they are not to approach the question of damages unless and until the the jury is satisfied that there is liability on the part of the defendant.

The Court: That is absolutely correct.

Mr. Behrens: I also feel that perhaps I didn't hear it, but I did not hear your Honor define for the benefit of the jury what is the fair preponderance of evidence, of credible evidence. Your Honor told the jury they were not to count heads, but I did not hear your Honor say anything affirmatively on the subject.

The Court: I did cover it, it is right there in my charge.

Mr. Behrens: I have one exception that I should like to take, and that is to all those parts of your Honor's charge dealing with the obligation of seaworthiness, it being my position there is no obligation at all so far as seaworthiness is concerned under the facts of this case.

The Court: Yes.

Mr. Behrens: May I have an exception to your Honor's rulings in that respect?

The Court: Certainly.

Mr. Frank: I have just one clarification request. I ask your Honor to charge the jury that the mere fact that Ryan loaded the vessel does not excuse the defendant Steamship Company, if the jury finds that the cargo was improperly [fol. 327] secured and that was the proximate cause of the accident.

The Court: I have charged that, haven't I?

Mr. Frank: No. If your Honor will read the request, that is why I requested it for a clarification.

The Court: I so charge.

Mr. Behrens: There is just one further matter of clarification. Many of the jurors are used to the State Court rule where five-sixths of a jury may bring in a verdict. I thought your Honor would like to tell them of the Federal rule.

The Court: That is a good idea. The rule here is that the verdict must be unanimous; there is no such arrangement by which a number on one side and a number on the other side may bring in a verdict. It is a unanimous verdict here, and you will bear that in mind when you retire for your verdict.

Are there any other things that you want?

Mr. Frank: No, your Honor.

The Court: How about you?

Mr. Schwartz: No, it has been covered by Mr. Behrens.

The Court: All right, the jury may retire and go to lunch.

Any of the exhibits, or any part of the testimony that you want to have read to you, you can send word what you want when you come back from lunch.

(The jury retired at 1:20 P. M.)

Requests 1 to 4 by the plaintiff are as follows:

1. If the jury finds that the accident was caused because the rolls of pulp were not properly secured by wedges, then the defendant, Pan-American Steamship Corporation, is liable for failure to furnish a seaworthy vessel. The mere fact that Ryan Stevedoring Company loaded the pulp at [fol. 328] Georgetown, South Carolina, and failed to prop-

erly secure the rolls, does not excuse the Pan-Atlantic Steamship Corporation.

(*Anderson v. Lorentzen*, 160 F. 2d 173; also pages 14-15 of plaintiff's trial memorandum.)

2. It makes no difference even if the mate was in no position to see whether they used wedges or dunnage because the obligation to furnish a seaworthy vessel is on the steamship company and the question of notice or knowledge to any of the officers of the vessel makes no difference.

(*Lauro v. U. S.*, 162 F. 2d 32, and cases cited on pages 17 and 18 of the plaintiff's trial memorandum.)

3. If the jury finds that the accident was caused by the failure to have the piles secured by proper wedges and that the pile was disturbed by the forward gang, that would not excuse the defendant.

4. If the place that the plaintiff was working in was unsafe by the absence of the wedges, then the mere fact that the forward gang in working on a different pile caused a disturbance of the pile from which the roll came that struck the plaintiff, does not excuse the defendant steamship company from its obligation.

(See pages 13, 14 and particularly on page 15, the following cases:)

LaGuerra v. Brasiliero, 124 F. 2d 553, 555.
Petition of L. Boyer's Sons Co., 25 F. 2d 602.
Caulfield v. Elmhurst Contracting Co., 54 N.Y.S. 2d at p. 29.
The Wearpool (CCA 5th Ct. 1950), 112 F. 2d 245.
The Martha Grimes (Judge Goddard in the Southern District Court of New York 1943, 49 F. Supp. 591, p. 594).

[fol. 329] Requests Nos. 1 and 2 of the defendant are as follows:

1. The witness, Fisher, has testified that chocks were ship's gear (S.M. 301) and that chocks were available at Georgetown, both on the vessel and on the dock alongside the vessel (S.M. 301). This testimony is uncontradicted. If

this testimony is believed by the jury, Pan-Atlantic Steamship Corp. is not to be held liable for the failure of Ryan's employees at Georgetown to use the chocks there available.

(See *Chioffi v. New Zealand Shipping Co.*, 80 F. Supp. 528, and cases cited therein.)

2. If the vessel was seaworthy when Ryan began stowing the cargo at Georgetown and the manner of Ryan's stowing the cargo rendered the vessel unseaworthy, the plaintiff, an employee of Ryan, may not recover against Pan-Atlantic Steamship Corp. on the ground of unseaworthiness of the vessel as to the stow.

(See *Lynch v. United States*, 163 F. [2d] 97.)

(At 4:30 P. M. the following occurred):

The Court: Mr. Foreman, I have received this note: "In the Judge's charge did his Honor say that the Pan-Atlantic Company is responsible for the actions of the Ryan Stevedoring Company?"

Now, I have asked the Reporter to go over what I did say in this connection between the Steamship Company and the Pan-Atlantic Company, and I think that the best way to inform you is to have him read the request to charge by Mr. Frank, which I charged.

(The following was repeated by the Reporter.)

"Mr. Frank: I have just one clarification request. I ask your Honor to charge the jury that the mere fact that Ryan loaded the vessel does not excuse the defendant Steamship Company, if the jury finds that the cargo was improperly secured and that was the proximate cause of the accident. [fol. 330] "The Court: I have charged that, haven't I?

"Mr. Frank: No. If your Honor will read the request, that is why I requested it for a clarification.

"The Court: I so charge."

The Court: Is that what you want to know?

A Juror: Yes.

The Court: Does that seem clear to you?

A Juror: Yes.

Mr. Behrens: Your Honor, I respectfully request that your answer to the jury be a categorical No, that this vessel

and the Pan-Atlantic Steamship Corporation are not responsible for the activities of Ryan in this case.

The Court: No, I won't say that.

Mr. Behrens: To which I respectfully except.

The Court: Now, Mr. Foreman, what have you on your mind now?

A Juror: I think we are more interested in the general law on that question: Is the principal responsible for the contractor's action.

The Court: On the question of agency, I suppose something of that kind?

A Juror: Yes, sir, that is right.

Mr. Frank: May I ask your Honor then to charge the jury that the obligation of the defendant to furnish the plaintiff with a reasonably safe place to work is nondelegable and persists despite any concurring duty on the part of the stevedoring company?

The Court: That is right.

Mr. Behrens: In that regard I ask your Honor to charge there is no question of agency in this case at all; that Ryan is an independent contractor in this case and is responsible for its own activity, and that Pan-Atlantic Steamship Corporation is not responsible in any way for anything that Ryan did or did not do.

Mr. Frank: That is not the law, that is not the theory of this case.

[fol. 331] The Court: You have two complaints here, one that the ship was negligent in not furnishing a safe place, and that really runs into the next complaint, which was that the ship was unseaworthy in that it was unsafe. Now, the relation of the steamship company and Ryan is entirely independent, as far as that goes, unless you find that Ryan did something to make the ship unsafe, and that it was unsafe and therefore unseaworthy. Is that plain?

A Juror: Yes.

Another Juror: Yes, sir.

Another Juror: Judge, your Honor, when you say you find, whom do you mean?

The Court: I say if it is your verdict, if that is your verdict, what you find actually occurred. There are two separate entities, the Ryan Stevedoring Company is a stevedor

ing Company, and it has its own employees and so forth. The steamship company is separate. But we are dealing now with whether there was some combination of the two which rendered the place unsafe to work in, and made the ship unseaworthy.

Juror: May I ask a question?

The Court: Yes.

Juror: Would the acts of say the Ryan Stevedoing Company, their action in unloading at the time, if that was responsible for making the ship unseaworthy according to law, does that still make Ryan responsible, or does that in effect make the shipowner, because the ship was made unseaworthy, responsible?

Mr. Schwartz: The juror is saying in discharging the vessel, not in loading it.

Mr. Behrens: What the juror said, in other words, the juror has asked your Honor if in the discharging of the cargo, Ryan's conduct has made the vessel unseaworthy, is the vessel to be charged with Ryan's conduct.

[fol. 332] Mr. Schwartz: I think we ought to have the statement of the juror read back, because that is the way I understood Juror No. 3 to ask the question.

Mr. Frank: Let me say this: I do not want to be held down in any way here. This is a very important point. A number of the other jurors have asked another question, and there may be confusion here among them. What the juror has in mind, as I understand it, if in Georgetown it was loaded improperly, and——

Mr. Behrens: No, no, that was not the question.

Mr. Frank: Let me finish. Don't instruct me about it at all. If in Georgetown it was loaded improperly, the fact that Ryan did it makes no difference, because the vessel is responsible for the loading, and if when it arrived in New York they were faced with an unsafe and insecure cargo, the question I think is whether Ryan itself is responsible, or the steamship company. And I say your Honor has charged, and you have repeated it, and the law is that the steamship company is responsible for bringing an unsafe cargo in that it was improperly stowed, and then inviting these men here to unload it.

Mr. Schwartz: That is not the juror's question.

Mr. Behrens: Mr Frank has again misinterpreted what is in the mind of the juror. The juror has said, as I understand it, and the record will show, if what they did in unloading in New York, is that correct?

The Juror: That is correct.

Mr. Behrens: In unloading in New York, if what they did during the unloading in New York, not Georgetown, as Mr. Frank would have it, but if what they did in unloading in New York created an unseaworthy vessel, then whose is the responsibility? Is this a liability, a responsibility of my client, or is it a responsibility of Ryan? And I am sure that Juror No. 3 will tell your Honor that that is what he has in mind. That is what I heard.

[fol. 2334] Mr. Frank: I heard it. I heard the word unload, but I want to know whether that is really what the juror had in mind. In other words, let me state this——

Mr. Behrens: No, I do not think there should be any further speeches before the jury, and that this problem presented by Juror No. 3 should be discussed with your Honor alone, lest we have another summation on behalf of the plaintiff.

The Court: I will ask the juror this: Was your question solely limited to what occurred in New York, and not in regard to the loading of the cargo?

The Juror: No, my question was with respect to the time of unloading in New York.

The Court: Yes.

The Juror: Limited to the unloading.

The Court: And not to the loading?

The Juror: Not to the loading.

Mr. Behrens: That is perfectly clear on the record——

Mr. Frank: I thought you didn't want any argument?

Mr. Behrens: It is the unloading in New York concerning which the juror inquires, not what happened in Georgetown, Mr. Frank.

The Court: Unloading an otherwise safe cargo?

Juror: Assuming it was safely loaded, and the unloading was an unsafe procedure.

Mr. Behrens: That is the whole point——

Mr. Frank: I thought you didn't want any argument?

Mr. Behrens: I do not care to hear any argument——

The Court: You understand that?

Juror: Yes, I do.

Mr. Schwartz: I do not think your Honor has answered the juror's question.

The Court: In other words, as I understand your question, if the ship was not negligent and not unseaworthy

The Juror: That is right.

[fol. 334] The Court: There should be a verdict for the defendant Steamship Company. It has nothing to do with Ryan, Ryan is not here as a party; is that it?

A Juror: I understand that, your Honor. The point I make is, if the steamship, or the company I should say, the steamship is made unseaworthy by the action of another person, the Ryan Company, in the act of unloading, does that make the steamship company responsible for that act?

Mr. Behrens: Now, we have the problem. In other words, if the vessel was all right so far as coming to New York is concerned, and then in the discharge of the cargo Ryan's employees created an unseaworthy condition, who is responsible?

Mr. Frank: Will your Honor permit, before answering that, to have the reporter re-read that last question of the juror?

(The juror's question was read as follows):

"Would the acts of say the Ryan Stevedoring Company, their action in unloading at the time, if that was responsible for making the ship unseaworthy according to law, does that still make Ryan responsible, or does that in effect make the shipowner, because the ship was made unseaworthy, responsible?"

Mr. Behrens: I say no, if they rendered it unseaworthy in discharge of the cargo there is no responsibility on the steamship company.

The Court: That is it.

Mr. Frank: Let me, in view of this inquiry, we have gotten into a position where there are obviously further things to be clarified. Let me ask your Honor to charge the jury as follows:

If the steamship left Georgetown in an unsafe condition

so far as the security of that cargo of pulp was concerned, in that it wasn't properly secured——

Mr. Behrens: That is not the question.

[fol. 335] The Court: That is not the question.

Mr. Behrens: That is not the question that the juror asked.

The Court: The juror has passed that by; we are assuming that the cargo was safe.

The Juror: That is right.

Mr. Behrens: When leaving Georgetown.

The Juror: That is right.

The Court: The ship was seaworthy when it got here, then did the Ryan folks make it unseaworthy.

Mr. Behrens: That is the question, the only question. That is what the juror wants to know.

Mr. Frank: I can't be any franker. If there was fault in the way Ryan unloaded it, that is not the fault of the steamship company.

The Court: That is right.

Mr. Behrens: That is right.

Mr. Behrens: That is what the juror wanted to know.

Mr. Frank: But your Honor, I think in view of the lengthy charge you gave, and the various requests, I want your Honor to entertain one more at this stage, because I think it is important, because the issues have become more or less confused. And I ask your Honor to charge on the other hand, that if when the vessel left Georgetown, it was improperly secured, the mere fact that some other employee of Ryan may have caused a disturbance of the cargo, that does not alter the original responsibility of the steamship company to furnish a safe place to this man.

The Court: But that is not the juror's question.

Mr. Behrens: That is not his question at all.

The Court: I will take your concession that you just made.

Mr. Frank: May I say this, your Honor——

The Court: Repeat that, Mr. Reporter, please.

Mr. Frank: May I make my own concession on the record?

[fol. 336] (Record read by the reporter as follows):

"Mr. Frank: I can't be any franker. If there was fault in the way Ryan unloaded it, that is not the fault of the steamship company.

"The Court: That is right."

Mr. Frank: Provided it was safe when it left Georgetown.

The Court: Oh, yes, yes.

Mr. Frank: That is important on what subsequently happened.

The Court: The juror understands that. I think you all understand that, don't you?

Jurors: Yes, quite.

The Court: Now, you understand it?

Jurors: Perfectly.

The Court: It is all clear to you with Mr. Frank's concession?

The Jurors: Yes.

Mr. Behrens: Thank you, your Honor.

The Court: Now, you can go back and continue your deliberations.

(The jury retired.)

(At 6:00 P. M. the following occurred):

VERDICT

The Clerk: Mr. Foreman, ladies and gentlemen of the jury, have you agreed upon a verdict?

The Foreman: We have.

The Clerk: How do you find, for the plaintiff or the defendant?

The Foreman: We find for the plaintiff.

The Clerk: In what amount, please?

The Foreman: $75,000.

The Clerk: $75,000, so say you all?

The Jurors: Yes, yes, yes.

The Court: Do you want the jury polled?

[fol. 337] Mr. Frank: I do not.

Mr. Behrens: No, your Honor, I do not care to have the jury polled.

The Court: All right. Any motions?

Mr. Behrens: Do you care to have my motions at this time?

The Court: Or would you prefer to do it tomorrow morning.

Mr. Behrens: I would prefer to do it tomorrow morning.

The Court: Very well. Well will set it for tomorrow morning at 11 o'clock.

(Adjourned to February 11, 1953, at 11 o'clock A. M.)

COLLOQUY

The Court: Let me get this straight. What are the motions before me now?

Mr. Behrens: There is no motion before your Honor at the moment; I am about to make my motions.

The Court: That is as to the verdict.

Mr. Behrens: Yes, your Honor.

The Court: But as to the trial, there are some issues between the third-party plaintiff and the third-party defendant, and some motions as to those issues. That is what I was getting at.

Mr. Schwartz: There was between the third-party plaintiff and the third-party defendant, and those motions are as follows, as far as I see it. There is a motion on the [fol. 338] part of the third-party defendant to dismiss the third-party plaintiff's complaint and for a directed verdict, and a motion by the third-party defendant for a directed verdict.

Mr. Behrens: Those motions have already been made, your Honor. I intended to make no motion at this time in connection with the third-party plaintiff's cause of action against Ryan, because all of those motions have already been made, and your Honor has reserved decision on them, and on this issue between Pan-Atlantic and Ryan, I did not consider that any further motions would be in order at this time.

The Court: But so far as this phase of the case is

concerned what do you intend to do, do you intend to furnish briefs on that?

Mr. Behrens: We are going to ask your Honor if we might have a period of time within which we may exchange briefs, and a further period within which we might reply.

The Court: How about charging this lien that you have against the recovery?

Mr. Schwartz: We have already disposed of that to this extent: The $9,837 which represents medical expenses by virtue of the accident, and which becomes a part of plaintiff's damages, is a lien against this $75,000 verdict. In addition to that Mr. Frank knows there has been $2,940 compensation. So we have a lien on the $75,000 to the extent of about $13,000.

That is no part of any question before your Honor at the present time, as we have a lien on plaintiff's recovery for that amount.

Mr. Frank: That is correct.

RENEWAL OF MOTIONS AND RULING THEREON

Mr. Behrens: Your Honor, I now move to set aside the jury's verdict on the ground that the verdict is contrary to the evidence, contrary to the weight of the evidence, and contrary to law. That is my first motion.

[fol. 339] The Court: I deny that motion, and give you an exception.

Mr. Behrens: I ask your Honor to direct judgment in favor of the defendant, notwithstanding the jury's verdict in behalf of plaintiff.

The Court: Motion denied, give you an exception.

Mr. Behrens: I also move for a new trial on the basis of all the exceptions I took to your Honor's adverse rulings throughout the trial, and exceptions that I took to your Honor's charge, and to your Honor's failure to charge as requested.

The Court: Yes. That motion is denied and give you an exception.

Mr. Behrens: I now move that your Honor direct that no judgment be entered herein until after your Honor has dis-

posed of the third-party claim. I make that motion pursuant to Rule 58 and Rule 54 (b) of the Federal Rules of Civil Procedure.

Mr. Frank: On that point I do not see how any controversy between the Steamship Company and the Stevedoring Company could affect the plaintiff's rights, because the plaintiff had nothing to do with the Ryan Stevedoring Company. There is a verdict against the Steamship Company, and judgment should be entered. If your Honor decides that no execution be issued upon that until there is a disposition of this other matter, I have no objection. But I certainly do not want to be stayed, and for this reason, there is a question of interest involved here. These gentlemen may take some time before they submit briefs, those things happen, some of them may be busy, or something or other, and I would like to have judgment entered.

The Court: Yes, I direct that judgment be entered for the plaintiff, but I can stay any execution.

Mr. Frank: That I am perfectly satisfied to accept if a reasonable stay.

[fols. 340-341] The Court: In order to give Mr. Behrens a proper foundation for his exceptions, I am denying this and I direct that judgment be entered, and that execution be stayed pursuant to a further order of this Court.

Mr. Frank: Until your Honor disposes of this other matter.

The Court: Until I have been able to decide it.

Mr. Frank: I am perfectly satisfied with that.

Mr. Behrens: I would like to take exception to your Honor's direction of entry of judgment, as I say pursuant to Rule 54, subdivision (b), which frowns upon piecemeal entry of judgments in cases of this kind. But your Honor has taken that position——

The Court: I have taken that position. I can remedy anything that happens in the future.

Mr. Behrens: Yes. As I see it, that leaves open for your Honor's pleasure only the question of when Mr. Schwartz and I shall exchange briefs.

The Court: Are those motions made with respect to the action of the third-party plaintiff against the third-party defendant a part of the record?

Mr. Schwartz: They have been stenographically reported and transcribed as part of the record.

The Court: Then they are in the record?

Mr. Behrens: Yes.

The Court: And they can be presented to me in the form of a brief, my attention can be called to them.

Mr. Behrens: Yes.

The Court: The minutes have already been written out except for the charge, and that will be ready shortly.

Now, what do you want to do about time?

(Briefs to be exchanged March 4, 1953, reply briefs and all papers submitted to the Court March 11, 1953.)

[fol. 342] PLAINTIFF'S EXHIBIT 1

Cargo Plan

(See opposite page)

PLAINTIFF'S EXHIBIT 2

Model of Hatch

(Omitted pursuant to stipulation)

(Here follows 1 Photolithograph, side folio 343.)

PLAINTIFFS' EXHIBIT 1

(P. 308A)

PAN-ATLANTIC STEAMSHIP CORPORATION
MOBILE, ALA.

LOADING PORTS: NEW ORLEANS — MOBILE — TAMPA — 7/12-49

PORTS DISCHARGING: BOSTON — NEW YORK

S-S CANTON VICTORY VOYAGE 11-NORTH

MOB-BOSTON
HIGH FILES - CL MATS

MIAMI-N.Y.
19 MTY DRUMS
1-TON
6-BAS RL-1-TON

GT/BOS 224 TON PULP

GT/N4 173 TON PULP

TAMPA-BOSTON 4896 CS CND CITRUS 98-TONS

GT/BOS 333 TON PULP

NEW ORLEANS-BOSTON 93-TONS CNO

TAMPA-BOSTON 4,000 CS CND CITRUS 197-TONS

GT/BOS 1ST TON PULP

GT/N4 137 TON PULP

GT/N4 476 TON PULP

TAMPA-BOSTON 4,000 CS CND CITRUS 91-TONS

TAMPA-BOSTON 4,000 CS CND CITRUS 91-TONS

TAMPA-N.Y. 1,000 CS CND CITRUS 3-TONS

GT/BOS 2/2 TON PULP

TAMPA-BOSTON CND CITRUS

GT/N4 O/S 49 TON PULP

GT/N4 465 TON PULP 108'

TAMPA-NEW YORK 5,698 CS CND CITRUS 121-TONS

TAMPA-NEW YORK 6,745 95-TONS

NEW ORLEANS-BOSTON 67 TONS PAPER

GT/N4 ← 168 TON PULP O/S

GT/BOS 45 TON PULP

GT/N4 157 TON PULP O/S

GT/N4 236 TON 109' PULP

TAMPA-NEW YORK 4,841 CS CND CITRUS 90-TONS

GT/N4 168 TONS PULP

GT/N4 207 TONS PULP

GT/BOSTON 70 TON PULP

GT/BOSTON 67 TON PULP

GT/N4 PULP

TAMPA-BOSTON 5,825 CS CND CITRUS 122-TONS

MOB-BOSTON 54 TONS PAPER

343

30654

[fol. 344] PLAINTIFF'S EXHIBIT 3

Diagram

(See opposite page)

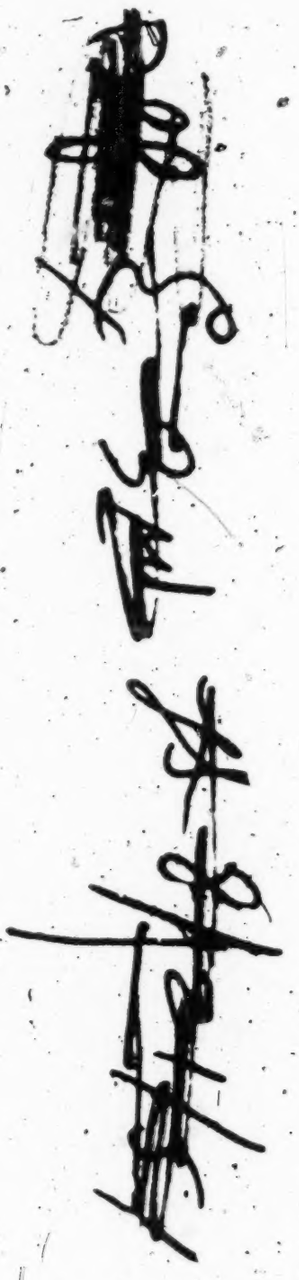
PLAINTIFF'S EXHIBITS 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18

Norwegian Hospital Record and X-rays

(Omitted pursuant to stipulation)

(Here follows Photolithograph, side folio 345.)

PLAINTIFFS' EXHIBIT 3 3101



[fol. 346] DEFENDANT'S EXHIBIT A

Statement of:

Full Name Gennaro Marchese Age 28 Occupation Longshoreman Residence Address 330 Ave. W—Bklyn. Residence Phone Ni 5-5376 Business Address Ryan Str. Referring to the acc'd which occurred on 7/20 1949 at about 4 P. M. at or near #3 hatch (aft.) of S/S Canton Victory—Pier #6 Bush-Bklyn.

I herewith make the following voluntary statement:

Soc. Sec. #722-10-3664. I have been working for Ryan for almost five years. Foreman date of acc'd was Anthony D'Amico.

On 7/20/49 at 4 P. M. there were four of us working on the starboard side of #3 L. H. discharging rolls of pulp (various weights). We had started to discharge lower hold about 1 P. M. and by 4 P. M. we had the square of the hatch cleared of cargo right down to the deck and were breaking down tiers in the wings (tiers about 3 or 4 rolls high). Our gang had eight men in the hold and #3 for'd gang had 8 men in hatch (Frank Sorba's gang). We had placed two rolls in the square of the hatch for discharge—one fore and aft and one burton. Frank Palazzola was standing between these rolls talking to foreman (Tony D'Amico) who was on the main deck however conversation had stopped and while he was still looking up the forward gang had dislodged a roll which caused roll on 2nd tier about 5 ft. away Palazzola to drop down from 2nd tier and seemed to graze the lower part of his face and body and landed on his left leg with Palazzola under roll (roll weighed about 3300 lbs.). [fol. 347] We called for hook right away and removed roll —man was not unconscious but was in great pain. He was removed to the pier on a pallet using ship's gear and removed by ambulance to Norwegian Hosp.

These rolls in wings were stowed fore and aft locked and bound by bildge type of stowing which required no dunnage or planking and lower rolls touching deck had little and insufficient chocking however this condition did not cause this acc'd and roll Pallazzola was struck with because dislodged by another roll. The tier that the roll fell

from had been partially removed at the same time we were removing rolls from the square of the hatch.

To my knowledge I do not recall whether the vessel had a list at time of acc'd. We started the discharge of #3 hatch at 8 A. M. on 7/20/49.

Dated at Pier #6 3/17/1951.

Witness J. E. Doherty

Signature in full Gennaro Marchese.

(Sign Each Page.)

[fol. 348] DEFENDANT'S EXHIBIT B

Book

(Omitted pursuant to stipulation)

DEFENDANT'S EXHIBIT D

Page 379 from Book "Modern Ship Stowage"

(See opposite page)

(Here follows 1 Photolithograph, side folio 349.)

DEFENDANT'S EXHIBIT "D" 3121

Small rolls about 21 inches in height, usually termed "cheese rolls" on the Pacific coast, are frequently carried and make very useful beam fillings.

Fine papers are usually packed in cases, and other types of paper are packed in bales and bundles, sometimes protected by means of wooden frames on top and bottom. In all cases, paper should be given careful stowage in a dry place to avoid damage from moisture.

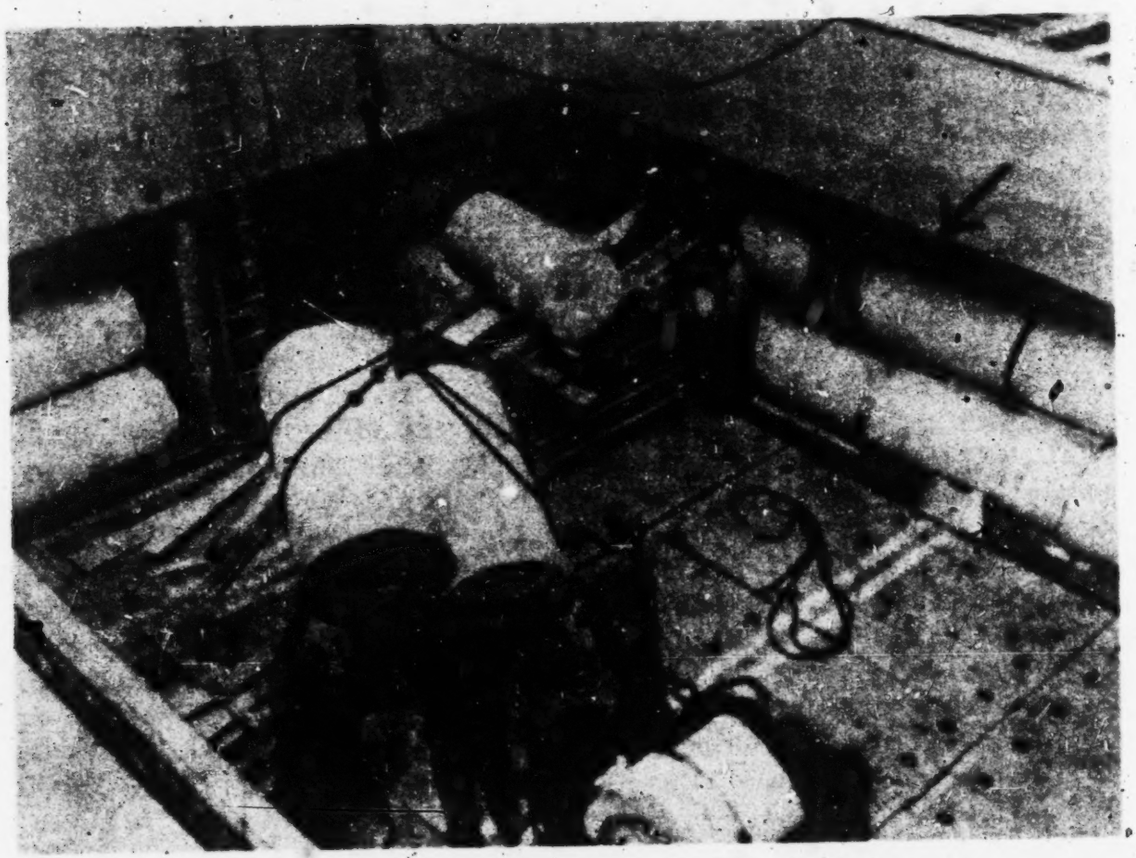


Figure 71.—Stowing newsprint in the 'tween decks.

Paper stock, wet.—Classed as an inflammable solid. See Dangerous Goods.

Paper waste, wet.—Classed as an inflammable solid. See Dangerous Goods.

Paprika.—A condiment made by grinding dried Spanish or Hungarian pimentos. It is shipped in bags and should be given clean, dry stowage as for foodstuffs.

Paraffin wax.—Should be given cool stowage to prevent melting, the melting point varying from 100° to 125° F. Should also be stowed clear of fine goods that might be damaged in case of melting and leakage.

Paraldehyde.—A combustible liquid. See Dangerous Goods.

Paranitraniline.—A poisonous article. See Dangerous Goods.

Paris green, solid.—A poisonous article. See Dangerous Goods.

Patchouli leaves.—An Eastern plant, shipped chiefly from British Malaya and Netherlands Indies, from the leaves of which a pungent oil is obtained. Because of its odor it should not be stowed near foodstuffs. The oil is an essential oil.

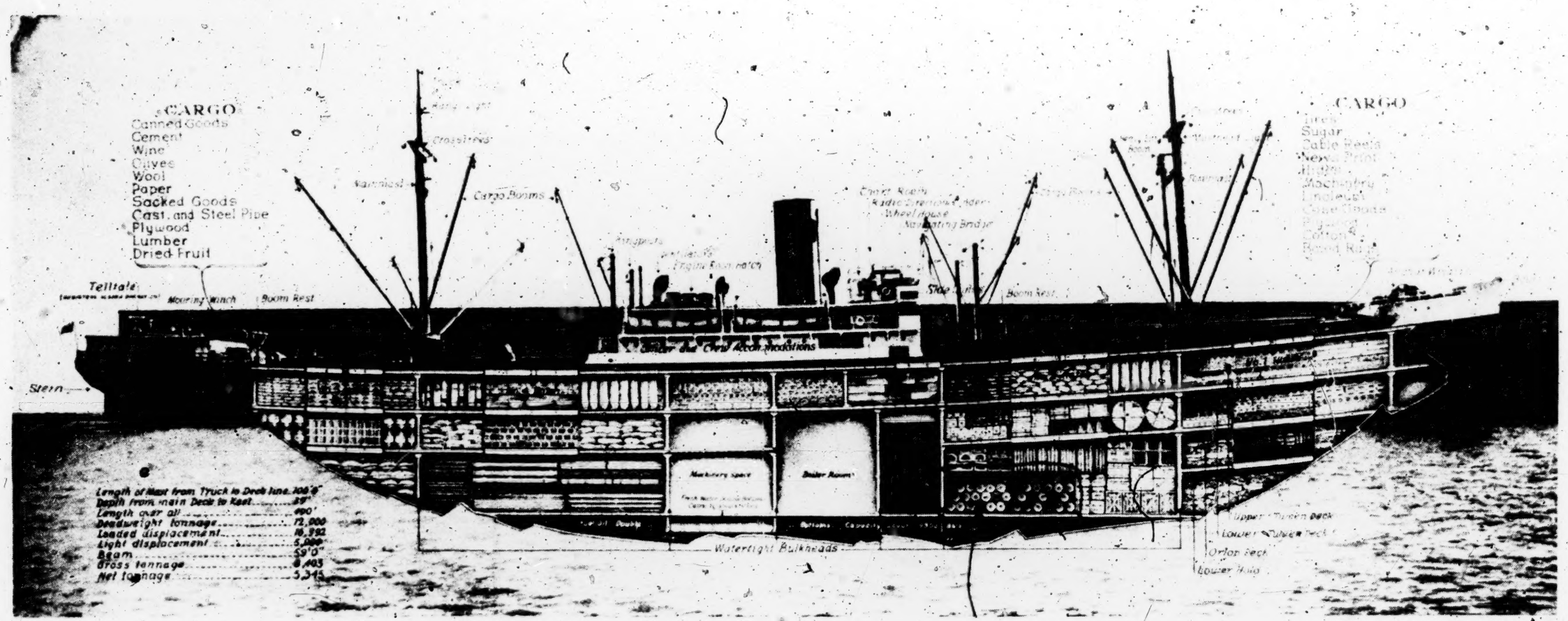
Patent fuel.—See Briquets.

[fol. 350] DEFENDANT'S EXHIBIT E

Picture from Book "Handling and Stowage and Cargo"

(Here follows 1 Photolithogragh, side folio 351.)

DEFENDANT'S EXHIBIT "E"



CROSS SECTION DRAWING OF TYPICAL CARGO VESSEL

351

311

[fol. 352] In United States District Court

Judgment Appealed from, Dated February 10, 1953

The Jury empanelled in the above entitled action, having rendered a verdict in favor of the plaintiff in the sum of $75,000.00.

It is accordingly adjudged that Judgment in the sum of $75,000.00 be and is hereby entered, and that Judgment be docketed accordingly and the bill of costs when taxed be Docketed.

Percy G. B. Gilkes, Clerk. By Charles F. Playne, Deputy Clerk.

Dated: Brooklyn, New York, February 10, 1953.

[fol. 353] In United States District Court

Notice of Appeal

Sirs:

Please take notice that the defendant, Waterman Steamship Corporation, and the defendant and third-party plaintiff, Pan-Atlantic Steamship Corporation, do hereby severally appeal to the United States Court of Appeals for the Second Circuit from the judgment dated and entered herein on February 10, 1953, and from each and every part thereof.

Gay & Behrens, Attorneys for Defendant, Waterman Steamship Corporation, and Defendant and Third-Party Plaintiff, Pan-Atlantic Steamship Corporation, Office & P. O. Address: No. 70 Pine Street, Borough of Manhattan, City of New York.

[fol. 354] To: Percy B. G. Gilkes, Clerk of United States District Court, Eastern District of New York. David M. Fink and Jacquin Frank, Esqs., Attorneys for Plaintiff, 141 Broadway, New York 6, N. Y. Alexander & Ash, Esqs., Attorneys for Third-Party Defendant, Ryan Stevedoring Co., Inc., 76 Beaver Street, New York 5, N. Y.

Dated: February 25, 1953.

[fol. 355] IN UNITED STATES DISTRICT COURT

OPINION BY INCH J. (THIRD-PARTY ACTION)

Inch, J.:

At the trial of this personal injury action the jury rendered a verdict in favor of plaintiff against the defendant, Pan-Atlantic Steamship Corporation (hereinafter called "Pan-Atlantic"), charterer of the S. S. Canton Victory.

At a pretrial conference plaintiff agreed to discontinue the action as against the defendant, Waterman Steamship Corporation.

Plaintiff, a longshoreman employed by Ryan Stevedoring Co., Inc., was seriously injured aboard the S. S. Canton Victory when he was struck by a roll of paper pulp during the discharge of the vessel's cargo at Brooklyn, N. Y. The theory of plaintiff's claim was that the cargo of paper pulp was improperly stowed. The loading of the cargo at Georgetown, S. C., and the discharge of the cargo at Brooklyn, N. Y., were both performed by plaintiff's employer, Ryan Stevedoring Co., Inc. (hereinafter called "Ryan").

[fol. 356] It was agreed among the parties that the only matter to be submitted to the jury was Pan-Atlantic's liability to plaintiff, and, in the event of a recovery, that the Court alone should determine the issues of fact and law presented by Pan-Atlantic's third-party complaint for indemnity over against Ryan.

In accordance with the allegations of plaintiff's complaint, and in line with the theory upon which the case was tried, the jury was charged as to unseaworthiness and negligence. The jury thereupon rendered a general verdict in favor of plaintiff against Pan-Atlantic in the sum of $75,000, and the matter now presented for determination is Pan-Atlantic's claim for indemnity against Ryan, the third-party defendant.

It is conceded that plaintiff's employer, Ryan, has complied with the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A., Sec. 901, *et seq.*, and it is also conceded that there was no written contract of indemnity between Ryan and Pan-Atlantic.

It is Pan-Atlantic's contention that while it has been held in this type of case that there can be no "contribu-

tion'' between joint tort-feasors (*American Mut. Liability Ins. Co.* v. *Matthews*, 2 Cir., 182 F. 2d 322; *Mikkelsen* v. *S/S Granville*, 2 Cir., 191 F. 2d 858, *per curiam* on petition for rehearing, 1951 A. M. C. 1938; *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282), those cases are inapplicable here for the reason that Pan-Atlantic was not a joint tort-feasor. Pan-Atlantic argues that liability has been visited upon it solely because of an improper stowage of cargo which made the ship unseaworthy and that since Ryan alone created the unseaworthiness which is ''essentially a species of liability without fault'' (*Seas Shipping Company* v. *Seiracki*, 328 U. S. 85, 94), this case comes within the rule of those cases which imply a contract of indemnity based upon the failure of a party to properly perform work which it contracted [fol. 357] to do. (See: *Burris* v. *American Chicle Co.*, 2 Cir., 120 F. 2d 218; *Rich* v. *U. S.*, 2 Cir., 177 F. 2d 688; *Standard Oil Co.* v. *Robbins Dry Dock & Repair Co.*, 2 Cir., 32 F. 2d 182; *Seaboard Stevedoring Corporation* v. *Sagadahoc S. S. Co.*, 9 Cir., 32 F. 2d 886; *U. S.* v. *Rothschild International Stevedoring Co.*, 9 Cir., 183 F. 2d 181.) In such cases the employer's or indemnitor's negligence is described as being the ''sole,'' ''active,'' ''primary'' or ''affirmative'' cause of the employee's injury. However, if the shipowner is a joint tort-feasor a contract of indemnity is not implied for

> ''To imply such a promise would mean that the employer agreed to protect the shipowner against liability arising out of the shipowner's own negligence. In the absence of an express promise, such an implication would be utterly unreasonable.'' (*American Mut. Liability Ins. Co.* v. *Matthews, supra*, p. 324).

The difficulty with Pan-Atlantic's contention is that it assumes that the jury's verdict was, and could only have been, based on a finding of unseaworthiness. The fact is that plaintiff's complaint alleged both unseaworthiness of the vessel and negligence on the part of Pan-Atlantic, and the case was tried and submitted to the jury on both theories.

In my judgment there is sufficient evidence in this record to justify a finding of negligence on the part of Pan-Atlantic by the jury, and also, pursuant to the stipulation

of the parties, for the Court to make such a finding with respect to the issues raised by the third-party complaint. It was plaintiff's basic claim that thin pieces of dunnage, rather than the customary wedges, had been used in stowing the cargo at Georgetown with the result that a roll of pulp "jumped" the dunnage and struck the plaintiff during [fol. 358] the discharge of the cargo at Brooklyn, N. Y.

The record shows that at the time of the accident Captain Fischer was the second mate of the S. S. Canton Victory. According to his testimony on direct examination, Ryan's job was to load cargo at Georgetown, "however to the general satisfaction of the mate in charge of the vessel, the master, and the chief officer and his under officers." Fischer said that one of his jobs was to "go in and out of each of the five holds, and * * * check to see that they (Ryan) were loading the cargo properly and *chocking* it," and that the "primary job, of course, was watching the cargo, this is in port, and to see that it is loaded and stowed properly for the safety of the vessel and the cargo and crew that sails the vessel." (Italics supplied.) On cross examination he stated that he also took into consideration the safety of the longshoremen who were to discharge the cargo, and that had he seen pieces of dunnage used instead of wedges he would have done something about it. He testified that he was in hold No. 3, where the accident occurred, both at the time of loading and unloading, to see that everything was properly done and that he was "primarily concerned to check the damage or the pilferage or *any unsafe method or practice.*" (Italics supplied.) It was his contention that the vessel generally carried a quantity of chocks aboard as part of the ship's gear, and that there were chocks on the dock and that Ryan's men used them to stow the cargo He agreed that if he had seen anything wrong he would have complained to the hatch boss or to the pier superintendent of the stevedore, but that everything was properly done by Ryan and that he made no complaints.

However, the hatch boss and three longshoremen in plaintiff's gang testified that there were no wedges used in the hold at all, and that merely "scrap" dunnage, which [fol. 359] one of the longshoremen described as "firewood"

was employed to stow the heavy rolls of paper. In view of this testimony, it is plain that Pan-Atlantic's cargo officer did not properly perform his admitted duty to supervise the safe and careful loading of the vessel. It cannot be said, as urged by Pan-Atlantic, that the absence of wedges was a latent or hidden defect which the cargo mate could not reasonably have been expected to discover. The testimony of the longshoremen as to the generally dangerous manner in which the cargo was stowed without wedges leads to no other conclusion but that the cargo officer in the exercise of reasonable care should have discovered and corrected the condition. Captain Fischer's own testimony shows his complete knowledge of the loading and unloading operation, the opportunity and ability on his part to discover the defect in stowage at either the loading or unloading port, and his authority to remedy the condition or halt the work. Consequently it is my conclusion that while Pan-Atlantic was guilty of a lesser degree of fault than Ryan, it was, nevertheless, a joint tort-feasor, and under such circumstances, a contract of indemnity cannot be implied on the part of Ryan.

Ryan is entitled to judgment in the third-party action together with costs.

The motions upon which decision was reserved are denied.

Settle order.

Robert A. Inch, Chief Judge, U. S. District Court.

[fol. 360] IN UNITED STATES DISTRICT COURT

JUDGMENT APPEALED FROM (THIRD-PARTY ACTION), DATED APRIL 15, 1953

In the foregoing action the verdict having been rendered by the jury on February 10, 1953, in favor of the plaintiff against the defendant and third-party plaintiff, Pan-Atlantic Steamship Corporation, and a judgment having been entered on February 10, 1953, in favor of the plaintiff against the defendant and third-party plaintiff, Pan-Atlantic Steamship Corporation, and the decision of the cause

between the third-party plaintiff, Pan-Atlantic Steamship Corporation, and the third-party defendant, Ryan Stevedoring Co., Inc., having been reserved for the Court and the Court on April 7, 1953, having rendered a decision on this latter issue in favor of the third-party defendant, Ryan Stevedoring Co., Inc., it is thereupon

Ordered, Adjudged and Decreed that the third-party complaint of Pan-Atlantic be and the same hereby is dismissed with costs taxed in favor of the third-party defendant as against the third-party plaintiff in the sum of $38.00, and it is further

Ordered, Adjudged and Decreed that from the judgment entered in favor of the plaintiff herein on February 10, 1953, there first be paid to American Mutual Liability Insurance Co., the compensation carrier for Ryan Stevedor-
[fol. 361] ing Co., Inc., the sum of $12,797.36, representing compensation payments made to the plaintiff in the amount of $2,940 and medical expenses aggregating the amount of $9,857.36.

Approved:

s/s Robert A. Inch, U. S. D. J.

Judgment Rendered, Brooklyn, N. Y., April 15, 1953.
s/s Percy G. B. Gilkes, Clerk.
Brooklyn, N. Y., April 15, 1953.

[fol. 362] In United States District Court

Affidavit of Sidney A. Schwartz re: Judgment, Dated April 15, 1953

State of New York,
County of New York, ss:

Sidney A. Schwartz, being duly sworn, deposes and says:

That he is a member of the firm of Alexander & Ash, attorneys for the third-party defendant, Ryan Stevedoring Co., Inc.

That this matter was tried before a Court and jury and resulted in a verdict in favor of the plaintiff as against the third-party plaintiff, Pan-Atlantic Steamship Corporation,

on February 10, 1953, and a judgment was entered thereupon by the Clerk.

That decision with respect to the right of the third-party plaintiff to recover indemnity against the third-party defendant was duly reserved for the Court and Chief Judge Inch rendered his opinion on April 1, 1953, in favor of the third-party defendant as against the third-party plaintiff and decreed that the third-party complaint be dismissed with costs in favor of the third-party defendant as against the third-party plaintiff.

That a judgment in accordance therewith is presented herewith.

(Sworn to by Sidney A. Schwartz, April 13, 1953.)

[fol. 363] In United States District Court

Notice of Appeal

Sirs:

Please take notice that the defendant, Waterman Steamship Corporation, and the defendant and third-party plaintiff, Pan-Atlantic Steamship Corporation, do hereby severally appeal to the United States Court of Appeals for the Second Circuit from the judgment dated and entered herein on April 15, 1953, and from each and every part thereof.

Gay & Behrens, Attorneys for Defendant, Waterman Steamship Corporation, and defendant and third-party plaintiff, Pan-Atlantic Steamship Corporation.

To:

Percy B. G. Gilkes, David M. Fink and Jacquin Frank, Esqs., Alexander & Ash, Esqs.

Dated: April 20, 1953.

[fol. 364] IN UNITED STATES DISTRICT COURT

ORDER SEVERING ACTION AS TO WATERMAN STEAMSHIP CORP.—May 7, 1953

Upon reading and filing the annexed stipulation, dated May 6th, 1953, signed by the attorneys for the respective parties hereto, it is, on motion of Gay & Behrens, attorneys for Waterman Steamship Corporation,

Ordered, that the within action of the plaintiff against the defendant, Waterman Steamship Corporation, be, and the same hereby is, severed, and that the action as to the said defendant Waterman Steamship Corporation, be, and the same hereby is, dismissed with prejudice and without costs.

Robert A. Inch, U. S. D. J.

Dated: Brooklyn, N. Y., May 7th, 1953.

[fol. 365] IN UNITED STATES DISTRICT COURT

STIPULATION SEVERING ACTION AS TO WATERMAN STEAMSHIP CORP.—May 6, 1953

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that the within action be, and the same hereby is, severed as to the defendant, Waterman Steamship Corporation, and dismissed without costs and with prejudice as to the said defendant, Waterman Steamship Corporation, and that order to such effect may be entered without further notice to any party.

Fink & Frank, Gay & Behrens, Alexander & Ash.

Dated: Brooklyn, N. Y., May 6th, 1953.

[fol. 366] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO EXHIBITS—November 30, 1953

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the exhibits heretofore used need not be printed but may be produced at the argument of the appeal, subject to the approval of the Court.

Plaintiff's Exhibit 2—Model of Hatch.

Plaintiff's Exhibits 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18—Norwegian Hospital Records and X-rays.

Defendant's Exhibit B—Book.

Gay & Behrens, David M. Fink and Jacquin Frank,
Alexander & Ash.

Dated, November 30, 1953.

[fol. 367] Stipulation as to record (omitted in printing).

[fol. 368] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 369] IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT, October Term, 1953.

No. 164

Argued February 2, 1954. Docket No. 22930

FRANK PALAZZOLO, Plaintiff-Appellee,

v.

PAN-ATLANTIC STEAMSHIP CORPORATION,
Defendant-Appellant,

and

PAN-ATLANTIC STEAMSHIP CORPORATION, Third-Party
Plaintiff-Appellant,

v.

RYAN STEVEDORING CO., INC., Third-Party Defendant-
Appellee.

OPINION—March 25, 1954

Before: CLARK, FRANK and HINCKS, Circuit Judges

Appeal from two judgments of the United States District Court for the Eastern District of New York, Inch, J., presiding. Affirmed in part; reversed in part.

[fol. 370] David M. Fink & Jacquin Frank (Jacquin Frank, of counsel) for plaintiff-appellee.

Gay & Behrens (Edward J. Behrens, Charles H. Lawson and James A. Hageman, of counsel) for defendant-appellant.

Alexander & Ash (Sidney A. Schwartz, of counsel) for third-party defendant-appellee.

Plaintiff, a longshoreman employed by Ryan Stevedoring Co., Inc., was injured aboard the S.S. Canton Victory when he was struck by a roll of paper pulp during the discharge of the vessel's cargo at Brooklyn, N. Y. The S.S. Canton Victory was operated and managed by defendant, Pan-Atlantic Steamship Corporation, under a bareboat charter. The loading of the cargo at Georgetown, South Carolina,

and the discharge of the cargo at Brooklyn, New York, were both performed by plaintiff's employer, Ryan Stevedoring Company. Plaintiff alleged that Pan-Atlantic had negligently caused or allowed the cargo of paper pulp rolls to be stowed in an improper and unsafe manner, and that the improper stowage resulted in plaintiff's being crushed by a "jumping" roll of pulp during the discharge of cargo. Plaintiff further alleged that defendant had failed to provide him with a seaworthy vessel. Pan-Atlantic impleaded Ryan Stevedoring Company, claiming indemnity on the ground that any negligence or unseaworthiness was due solely to Ryan since it had exclusive control of loading and unloading the S.S. Canton Victory. It was agreed among the parties that the only matter to be submitted to the jury was Pan-Atlantic's liability to plaintiff, and, in the event of a recovery, that the court alone should determine the issues of fact and law presented by Pan-Atlantic's third-party complaint for indemnity over against Ryan. The jury rendered a verdict of $75,000 for plaintiff against [fol. 371] Pan-Atlantic and judgment was awarded thereon. The court awarded judgment together with costs to Ryan in the third-party action. Pan-Atlantic appeals from both judgments.

The opinion of the district court is reported in 111 Fed. Supp. 505.

FRANK, *Circuit Judge:*

Defendant-appellant, Pan-Atlantic, has argued that, since Ryan Stevedoring Company created the hazardous condition by improperly stowing the cargo in Georgetown, South Carolina, Pan-Atlantic should not be held liable to plaintiff. We cannot agree. Not only did defendant owe the duty to provide a seaworthy ship on which plaintiff-stevedore might work, *Seas Shipping Company v. Sieracki*, 328 U. S. 85, but it owed him, as a business visitor or invitee, the duty to provide a reasonably safe place to do his work. *Fodera v. Booth American Shipping Corp.*, 159 F. (2d) 795 (C. A. 2). This duty was non-delegable. *Vanderlinden v. Lorentzen*, 139 F. (2d) 995, 997 (C. A. 2). Since it is reasonably foreseeable that improper stowage must result in rolls of pulp sliding or "jumping" and striking someone, the ship would be liable for this accident if the jury

found, as it did here, that the accident resulted from improper stowage. *La Guerra* v. *Brasiliera*, 124 F. (2d) 553 (C. A. 2). Proper stowage is an element of seaworthiness. *Pioneer Import Corp.* v. *The Lafcomo*, 138 F. (2d) 907 (C. A. 2). There was ample evidence to support a jury verdict on either or both negligence or unseaworthiness.

Nor does defendant's "surrender-of-control"[1] argument compel a different result. Assuming *arguendo* defendant [fol. 372] did surrender control of the Canton Victory to Ryan for loading in Georgetown,[2] Pan-Atlantic reassumed control of the ship upon completion of the stowage operation, and operated it for some three or four days until its arrival in New York. At the time of discharge of cargo, the duty to the stevedore arose and Pan-Atlantic, in control of its ship, was obligated to provide the stevedore with a safe place to work and a seaworthy vessel. *Seas Shipping Company* v. *Sieracki, supra.*

Defendant claims error in the failure of the trial court to strike the testimony of plaintiffs' expert Anderson; the substance of this claim is that Anderson was not sufficiently qualified to testify as an expert. Although Anderson's qualifications were weak, his lack of experience in the stowage of pulp paper was for the jury to weigh. The judge's determination as to Anderson's qualifications was not so clearly erroneous that it ought to be reviewed here. See *Gila Valley R. Co.* v. *Lyon*, 203 U. S. 465.

Judgment on the action for indemnity over was awarded to Ryan. We think this error. The trial judge found Pan-Atlantic guilty of negligence in that its "cargo officer did not properly perform his admitted duty to supervise the safe and careful loading of the vessel."[3] However, Ryan created the hazardous condition by its improper stowage

[1] Defendant cites *Lauro* v. *United States*, 162 F. (2d) 32 (C.A. 2); *Grasso* v. *Lorentzen*, 149 F. (2d) 127, cert. den. 326 U. S. 742; *Lynch* v. *United States*, 163 F. (2d) 97 (C. A. 2).

[2] It appears from the record that a cargo officer of the Canton Victory was aboard at Georgetown to supervise loading.

[3] 111 F. Supp. 505 at 507.

of the pulp paper rolls at Georgetown. We think the improper stowage the primary and active cause of the accident. Under our holdings in *Lo Bue* v. *United States*, 188 F. (2d) 800, and *Rich* v. *United States*, 177 F. (2d) 688, indemnity over is recoverable where, as here, the employer's negligence was the "sole" "active" or "primary" cause of the accident. Nor does the absence of a formal contract [fol. 373] bar indemnity. *McFall* v. *Compagnie Maritime Belge (Lloyd Royal) S.A.*, 304 N. Y. 314; *Rich* v. *United States*, 117 F. (2d) 688. Ryan was obligated by implied contract to perform the work in a reasonably safe manner. This duty Ryan breached; accordingly, Pan-Atlantic is entitled to indemnity. There is no need to remand. We direct the judge to enter judgment for Pan-Atlantic against Ryan Stevedoring Company on the action over.

Affirmed as to Palazzolo v. Pan-Atlantic Steamship Corporation; reversed as to the action over.

[fol. 374-375] IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 22,930

FRANK PALAZZOLO, Plaintiff-Appellee,

v.

PAN-ATLANTIC S.S. CORP. & ANO., Defendant-Appellant & 3rd Party, Plaintiff-Appellant,

RYAN STEVEDORING CO., INC., 3rd Party Defendant-Appellee.

JUDGMENT—March 25, 1954

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District

Court as to Palazzolo against Pan-Atlantic Steamship Corporation be and it hereby is affirmed; with directions to enter judgment for Pan-Atlantic Steamship Corporation against Ryan Stevedoring Company on the action over in accordance with the opinion of this Court with costs to appellant, Pan-Atlantic Steamship Corporation.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

A. Daniel Fusaro, Clerk

[fol. 376] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 375] SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 157

RYAN STEVEDORING CO., INC., Petitioner,

vs.

PAN-ATLANTIC STEAMSHIP CORPORATION

ORDER ALLOWING CERTIORARI—Filed October 14, 1954

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8683)

List of Briefs filed
in Docket No. 4

1 - Petition for Writ of Certiorari

2 - Reply Brief of Petitioner

3 - Brief for Petitioner

4 - Petitioner's Objections to Motion of American Merchant Marine Institute, Inc., for Leave to File a Brief Amicus Curiae

5 - Petitioner's Objections to Motion of Association of American Ship Owners to File Brief as Amicus Curiae

6 - Reply Brief for Petitioner to That of Pan-Atlantic Steamship Corporation

7 - Reply Brief for Petitioner to That of the United States, as Amicus Curiae

8 - Petitioner's Objections to Motion of the American Merchant Marine Institute, Inc., to File Brief as Amicus Curiae

9 - Petitioner's Objections to Motion of Association of American Ship Owners to File Brief as Amicus Curiae

10 - Brief in Opposition to Petition for Writ of Certiorari

11 - Respondent's Objection to Motion by National Association of Stevedores for Leave to File Brief as Amicus Curiae Pursuant to Rule 42

12 - Brief for Respondent

13 - Brief for the United States as Amicus Curiae

14 - Memorandum for the United States as Amicus Curiae in Response to Petitioner's Reply Brief

15 - Motion of American Merchant Marine Institute, Inc. for Leave to File a Brief Amicus Curiae

16 - Petition of Petitioner for Rehearing

17 - Motion for Leave to File Brief of the National Association of Stevedores as Amicus Curiae Pursuant to Rule 42

18 - Motion of Association of American Ship Owners for Leave to File a Brief Amicus Curiae.

List of Briefs (Continued)

19 - Motion of American Merchant Marine Institute, Inc. for Leave to File a Brief Amicus Curiae on Reargument

20 - Motion of Association of American Ship Owners for Leave to File a Brief Amicus Curiae.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 157

RYAN STEVEDORING CO., INC.,

Petitioner,

—v.—

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SIDNEY A. SCHWARTZ,
Counsel for Petitioner.

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In the

Supreme Court of the United States

October Term, 1953

No.

Ryan Stevedoring Co., Inc.,

Petitioner,

—v.—

Pan-Atlantic Steamship Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Ryan Stevedoring Co., Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled action on March 25, 1954 (R. 372).

Petitioner herein seeks a review by this Court of only so much of the judgment, entered upon the decision of the United States Court of Appeals for the Second Circuit (R. 369-372), which granted indemnity in favor of Pan-Atlantic Steamship Corporation against the petitioner herein.

Opinions Below

The opinion of the United States District Court is officially reported in 111 F. Supp. 505. The opinion of the United States Court of Appeals for the Second Circuit is officially reported in 211 F. 2d 277 and appears at page 369 of the Transcript of Record.

Jurisdiction

The judgment of the United States Court of Appeals was entered on March 25, 1954. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254(1).

Questions Presented

(1) Is a contracting-stevedore, who complies with the provisions of the U.S. Longshoremen's and Harbor Workers' Compensation Act, Title 33, United States Code, §901 *et seq.*, insulated under the very wording of the Act (§905) from any claim or action in which full indemnity (there being no express contract of indemnity) is sought against him by a shipowner who has been held liable to an employee of the contracting stevedore.

(2) If the aforesaid Act, as worded, does not furnish complete immunity to a contracting stevedore against a claim of indemnity, implied in law, of a shipowner who has been liable to an injured employee of the contracting stevedore, can there be indemnity implied in the maritime law (there being no express contract of indemnity) between joint tortfeasors in a non-collision case, *i.e.*, a personal injury action.

(3) After the jury had rendered a verdict in favor of the injured longshoreman against the shipowner herein, Pan-Atlantic Steamship Corporation, the Trial Judge, sitting without a jury, pursuant to stipulation of the parties, decided all questions of fact and law respecting the shipowner's right of indemnity. Where the Trial Judge as the trier of the facts in a non-jury action has found that the shipowner and the contracting stevedore were joint tort

feasors, which is equivalent to a determination that the negligence of each caused or contributed to the accident, can an Appellate Court on review of the Trial Judge's findings in a non-jury case disregard his findings of causation and draw its own conclusions as to causation where it could not do so had a jury been the trier of the facts.

Statute Involved

The provision of the U.S. Longshoremen's and Harbor Workers' Compensation Act, Title 33, United States Code, §901 *et seq*, which is involved is §905 thereof which reads as follows:

"Exclusiveness of liability. The liability of an employer prescribed in section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee. (Mar. 4, 1927, c. 509, §5, 44 Stat. 1426.)"

Statement of the Case

On July 20, 1949 one, Frank Palazzolo, a longshoreman employed by Ryan Stevedoring Co., Inc., hereinafter referred to as Ryan or petitioner, was injured aboard the S.S. Canton Victory, lying in navigable waters in the port of New York, when he was struck by a roll of paper pulp during said vessel's discharge at Brooklyn, New York.

The S.S. Canton Victory was operated, managed and controlled by Pan-Atlantic Steamship Corporation, hereinafter referred to as Pan-Atlantic or respondent.

The loading of the cargo of paper pulp was performed at Georgetown, S. C., by petitioner as was the discharge of the vessel at Brooklyn, N. Y.

To recover pecuniary damages for the personal injuries sustained by him, Palazzolo instituted an action against Pan-Atlantic in the Supreme Court of the State of New York, County of Kings, and Pan-Atlantic removed said action to the United States District Court for the Eastern District of New York.

In his complaint against Pan-Atlantic (R. 9-10) Palazzolo alleged that Pan-Atlantic had negligently caused, suffered and permitted rolls of paper pulp to be loaded and transported negligently and had failed to furnish a seaworthy vessel. The theory of Palazzolo's case was that a roll of paper pulp, which had not been "chocked" properly, had jumped out of its tier during the discharge of the rolls of paper pulp and had crushed his leg.

After the action had been removed, Pan-Atlantic impleaded Ryan (R. 17) and sought *indemnity* on allegations that Ryan was exclusively in control of the portion of the vessel where Palazzolo was hurt (R. 14, 15) and that if the rolls of paper pulp were loaded improperly on the S.S. Canton Victory and if the vessel were unseaworthy then said condition had been caused solely by Ryan.

At the opening of trial before Senior Judge Inch of the Federal Court in Brooklyn it was conceded that Ryan had complied with the provisions of the U.S. Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §901 *et seq.*, and that in addition to compensation benefits there had been paid by Ryan's compensation carrier $9857.36 representing medical expenses in treating Palazzolo (R. 60, 61).

It was also stipulated between Pan-Atlantic and Ryan that all proof dealing with the claimed right of indemnity of Pan-Atlantic against Ryan was to be adduced before the Trial Court at the same time that Palazzolo tried his jury action against Pan-Atlantic and that the Trial Court, without benefit of jury, would determine as a matter of *fact* and *law* Pan-Atlantic's claimed right of indemnity or recovery over.

In accordance with the allegations of Palazzolo's complaint, and in line with the theory upon which Palazzolo's action had been tried, the jury was charged as to unseaworthiness and negligence. The jury rendered a general verdict of $75,000 against Pan-Atlantic (R. 336) upon which judgment was entered.

The Trial Court, in accordance with the stipulation between Pan-Atlantic and Ryan, having heard all of the witnesses in open court (there being no testimony adduced by way of deposition), handed down its decision (R. 355-359; 111 F. Supp. 505) denying any right of indemnity in favor of Pan-Atlantic and granting judgment to Ryan dismissing Pan-Atlantic's third party complaint.

Although Ryan urged to the Trial Court that its compliance with the U.S. Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, and particularly §905 thereof, insulated Ryan completely from any claim of *indemnity*, the Trial Court preferred to place

its dismissal of Pan-Atlantic's third party complaint upon the findings of fact which it set forth in its opinion (R. 358-359; pp. 506 and 507 of 111 F. Supp.). They revolve around the *uncontradicted* testimony of Pan-Atlantic's own cargo mate, Captain Fisher.

This *uncontradicted* testimony shows that although it was Ryan's job to load the S.S. Canton Victory at Georgetown it had to be done "however to the general satisfaction of the mate in charge of the vessel, the master, and the chief officer and his under officers" (R. 236). Captain Fisher's job was to go in and out of the five holds to check to see that Ryan was loading the cargo properly and chocking it for his "primary job, of course, was watching the cargo, this is in port, and to see that it is loaded and stowed properly for the safety of the vessel and the cargo and the crew that sails the vessel" (R. 259). He recognized that his job of supervision was important in so far as it also involved the safety of the longshoremen who came on board to discharge the vessel (R. 276). The Trial Court, completely supported by the record, found as a fact (R. 358) that

> "the cargo mate was in hold No. 3, where the accident occurred, both at the time of loading and unloading to see that everything was properly done and that he was 'primarily concerned to check the damage or the pilferage or *any unsafe method or practice*.'" (Single quoted matter and italics so indicated in original opinion.)

According to the cargo mate everything was done properly by Ryan and no complaints were made by him (R. 358).

The ultimate finding of the Trial Court, which sums up appropriately all of the uncontradicted testimony given by the cargo mate, is this (R. 359):

"Captain Fischer's (sic) own testimony shows his complete knowledge of the loading and unloading operation, the opportunity and ability on his part to discover the defect in stowage at either the loading or unloading port, and his authority to remedy the condition or halt the work."

The Trial Court in denying indemnity to Pan-Atlantic concluded that Pan-Atlantic and Ryan were joint tort-feasors.

Pan-Atlantic appealed from the judgments entered in Palazzolo's and Ryan's favor.

The U. S. Court of Appeals for the Second Circuit affirmed the judgment in favor of Palazzolo but reversed the judgment in Ryan's favor and directed judgment in favor of Pan-Atlantic against Ryan (R. 369-373; 211 F. 2d 277).

This application for a writ of certiorari then followed.

Reasons for Granting the Writ

1. The first question that petitioner presents to this Court is the judicial construction to be accorded to the "exclusive remedy" provision of the U.S. Longshoremen's and Harbor Workers' Compensation Act, §905 of Title 33 of the United States Code, in so far as it bears upon and controls claims of indemnity (implied in law) by shipowners against stevedores in personal injury actions arising out of maritime torts. The question of the judicial construction to be accorded §905 of Title 33, United States Code, is singularly important to the shipping industry[1]

[1] Petitioner understands that the National Association of Stevedores, an organization that represents stevedoring firms in all the major ports of the United States, will seek leave to file a brief amicus curiae in support of Ryan's

for in every port of the United States where stevedoring of vessels takes place and accidents arise therefrom it is a foregone conclusion that an injured longshoreman will bring action against the shipowner who in turn will implead the stevedore-employer and seek indemnity implied in law.

This type of hydra-headed litigation is omnipresent and all courts which have been confronted[2] in recent times with the problem of the judicial construction to be placed upon this federal statute, whether it be in *contribution* or *indemnity* actions, have gone in all directions.

This Court in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, decided January 14, 1952, 342 U. S. 282, 74 S. Ct. 203, found it unnecessary to determine whether §905 (Section 5 of the Act) was a bar to a claim of *contribution* for it based its decision on other grounds. Research has disclosed no case where this Court has, even by way of dicta, pointed the way out of the morass and welter of

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petition so that the stevedoring industry may obtain a determination of the perplexing problem presented by §905 of Title 33 of the United States Code, which is exemplified by the authorities which are set forth in footnote 2 of this petition.

2. Thus, we find the problem decided or discussed within rather recent times in the following opinions: *American Mutual Liability Insurance Co.* v. *Matthews*, 2 Cir., 182 F. 2d 322; *Gill* v. *U. S.*, 2 Cir., 184 F. 2d 49; *Slattery* v. *Marra Bros.*, 2 Cir., 186 F. 2d 134; *Mikkelsen* v. *The Granville*, 2 Cir., 191 F. 2d 858; *States SS Co.* v. *Rothschild International Steve. Co.*, 2 Cir., 205 F. 2d 253; *Crawford* v. *Pope & Talbot Inc.*, 3 Cir., 206 F. 2d 784; *Brown* v. *American-Hawaiian SS Co.*, 3 Cir., 211 F. 2d 16; *Union Sulphur & Oil Corp.* v. *W. J. Jones & Son*, 9 Cir., 195 F. 2d 93; *Standard Wholesale P & A* v. *Ruckert Terminals Corporation*, 1949 A. M. C. 818, 193 Md. 20; *Liberty Mutual Ins. Co.* v. *Vallendingham*, 94 F. Supp. 17; *Baird* v. *McShain Inc.*, 108 F. Supp. 553; *Coates* v. *Potomac Electric Power Co.*, 95 F. Supp. 779, 96 F. Supp. 1019; *Miranda* v. *City of Galveston*, 98 F. Supp. 245; *Landberg* v. *Prudential Steamship Corp.*, 102 F. Supp. 115; *Valerio* v. *American President Lines*, 112 F. Supp. 202; *Dubetz* v. *North American Shipping Co.*, not officially reported, reported in 1951 A. M. C. 492; *Lukasiewicz* v. *Moore McCormack Lines*, 104 F. Supp. 572; *Barber SS Lines* v. *Quinn Bros.*, 104 F. Supp. 78.

confusion which results from a reading of the decisions of the lower courts which are set forth in footnote 2 hereof.

Where the Congress has in clear and explicit language stated in Section 5 of the Act (§905 of Title 33 of the United States Code) that the liability of an employer, as prescribed in Section 4 of the Act, to wit, compensation, "shall be exclusive and in place of *all other liability of such employer to * * * anyone otherwise entitled to recover damages from such employer* at law or in admiralty on account of such injury" it would appear that a stevedore-employer should be entitled "to rest on the clear, unambiguous words of the statute" (*Baird v. John McShain, Inc.*, 108 F. Supp. 553). Especially should this be so where there has never been any evidence in any decision that the legislative intent, as evidenced by hearings, reports, etc., was other than that which the Congress mirrored in the explicit language it employed in Section 5 of the Act.

The benefits which the Congress creates are often measured by the interpretation placed upon them by the judiciary. The benefits that the Congress has created under the Act in question are (1) a guaranteed compensation to an employee for every injury arising out of and in the course of employment, with fault or negligence playing no part, and (2) an absolute, certain, exclusive and circumscribed liability on the part of the employer. As Congressman Graham said in speaking on the floor of the House of Representatives in favor of the adoption of the Act (Congressional Record, 69th Congress, Second Session, March 2, 1927, Vol. 68, p. 5411):

> "Hearings were granted, conferences were held and every endeavor made to secure a bill that would be beneficial to the workman and not oppressive to the employer and that would not be a destructive burden on industry; and I think we have accomplished that."

Manifestly, Congressional intent in part was that the Act should and would "not be oppressive to the employer", or a "destructive burden on industry."

And yet, if impleader by shipowners of stevedoring companies continues in actions wherein the stevedore's employees have sued the shipowner, which impleader is the highly fashionable trend and practice today in the various ports of the United States, the stevedore will be constantly forced to defend such actions even though he has complied with the provisions of the Act—this, in complete nullification of the clear and explicit language of the Congress that there shall be no other liability on the part of the stevedore to "anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury." To allow the continuance of the impleader of stevedores-employers is to sanction what actually amounts to law suits against them by their own employees —this, in contravention to the Act. The shipowner, the primary defendant and third party plaintiff, has become and will become a mere conduit through whom the injured employee-longshoreman recovers from his stevedore-employer. The result destroys the basic principle of compensation. (See, *Johnson* v. *United States*, 79 F. Supp. 448.)

Further, this Court in recent decisions (*Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *Pope & Talbot Inc.* v. *Hawn*, 346 U. S. 406; *Alaska Steamship Company* v. *Petterson*, decided April 5, 1954, 74 S. Ct. 601) has determined the rights of injured maritime workers against shipowners and has crystallized the federal law applicable thereto. From the recent decision in the *Petterson* case, *supra*, it certainly is to be anticipated that shipowners, now held liable to independent contractor's employees for gear which is supplied by the stevedore-employer, will implead the independent contractors-employers and seek *indemnity* from said

employers. There being no decision[3] from this Court determining the rights and obligations of shipowner and stevedore-employer *inter sese*, in the light of the Act here involved, settlement of the judicial construction of this federal statute, its proper functioning and administration, which statute will always be involved where the parties are aligned as they have been in this litigation, should, it is respectfully submitted, emanate from this Court.

2. This Court has never determined, in so far as research has disclosed, that in a maritime tort non-collision case the maritime law which is here applicable (*Pope & Talbot Inc. v. Hawn*, 346 U. S. 406) implies indemnity in favor of one joint tortfeasor against another joint tortfeasor. It would appear that this Court and the U. S. Court of Appeals for the Second Circuit have looked at contribution and indemnity as merely projecting a question of the *quantum* of recovery. In *Erie R. Co. v. Erie & W. Transp. Co.*, 204 U. S. 220, this Court characterized a division of damages, *viz.*, contribution, as "partial indemnity."

The U. S. Court of Appeals for the Second Circuit, per Chief Judge L. Hand, forcefully characterized this principle in *Slattery v. Marra Bros.*, 186 F. 2d 134, as follows (p. 138):

> " " " Such cases (dealing with indemnity on the basis of active-passive negligence) may perhaps be accounted for as lenient exceptions to the doctrine that there can be no contribution between joint tortfeasors, *for indemnity is only an extreme form of contribution.*" (Parenthetical matter and italics supplied.)

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3. As has been indicated heretofore, *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, does not reach the question here presented, by virtue of this Court's express statement in footnote 12 of its decision (p. 286 of 342 U. S.) that it was unnecessary to construe the Act here involved in view of the holding arrived at.

If there is no difference in theory between *contribution* and *indemnity* then it would appear that the decision of the U. S. Court of Appeals in this matter is in conflict with the "principle" enunciated by this Court in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282. Such conflict "in principle" should, it is respectfully submitted, commend itself to this Court's granting the writ respectfully prayed for in order to resolve said conflict.

3. If the action of Pan-Atlantic against Ryan had been tried by a jury a federal Appellate Court, upon review, would be bound to ascertain whether there was any evidence in support of the findings made by, or verdict of, the jury and once it had found that the jury's determination was supported by the evidence it could not substitute its own inferences for that of the jury. Had the right over in this matter been tried by jury it would seem that the question of who was actively or passively negligent would be a question of fact for the jury. For, as the New York Court of Appeals recently said in *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314, 328:

> "Whether negligence is passive or active is, generally speaking, a question of fact for the jury."

In the instant matter the Trial Court in its opinion held that Pan-Atlantic and the petitioner were joint tortfeasors and denied any recovery for the inherent reason that the finding of a joint tortfeasor relationship necessitated the corollary finding that the negligence of each was of such a quality that it caused or contributed to the happening of the accident. In so far as causation is concerned the U. S. Court of Appeals for the Second Circuit has held that causation is a question of fact. *F. E. Grau-*

willer Transp. Co., Inc. v. Gallagher Bros. Sand & Gravel Corporation, 153 F. 2d 384, 385.

Despite the foregoing the U. S. Court of Appeals in this matter determined that the "*sole*" "*active*" or "*primary*" *cause* of the accident to Palazzolo was the negligence of Ryan in the loading of the vessel. Completely overlooked and, indeed, not mentioned was the Trial Court's finding, supported by the uncontradicted testimony set forth in its opinion, that Pan-Atlantic affirmatively and actively caused the accident and participated in bringing the same about.

In reversing the finding of the Trial Court, which finding is completely supported by the record, the U. S. Court of Appeals has projected uncertainty as to the scope of appeals in maritime or non-jury actions.

This matter commends itself to a consideration by this Court of the scope of appeals in non-jury cases of the type here involved because of its importance to the proper operation of the federal system of appellate review in maritime non-jury matters. (Cf. *McAllister v. United States*, 207 F. 2d 535; certiorari granted, April 5, 1954, No. 566, U.S. Law Week, April 6, 1954, 22 LW 3250.)

ARGUMENT

Ryan's compliance with the U. S. Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. §901 *et seq.*, is a complete bar to any claim of indemnity by Pan-Atlantic against Ryan.

Upon the trial of this matter it was conceded (R. 60-61):

> "that Ryan Stevedoring Co., Inc., in compliance with the terms of U.S. Longshoremen's and Harbor Workers' Compensation Act, in pursuance thereto there were paid by the compensation carrier for Ryan Stevedoring Company certain sums for compensation and $9857.36 as medical expenses, the reasonableness of which medical expenses is conceded by all concerned."

Having therefore complied with the provisions of the statute dealing with compensation, 33 U.S.C.A. §904, and with medical services, 33 U.S.C.A. §907, Ryan invoked as a defense (R. 20-21) and presented to the Trial Court for determination the effect of §905 of 33 U.S.C.A. which reads as follows:

> "The liability of an employer prescribed in section 904 of this chapter *shall be exclusive and in place of all other liability of such employer to* the employee, his legal representative, husband or wife, parents, dependents, next of kin, and *anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury* * * *" (Italics supplied.)

These words are clear, unambiguous and unequivocal and no aids to legislative intent need be sought in this instance.

If any were sought, they would aid Ryan's contention, if at all.[4]

The Trial Court did not place its exoneration of Ryan upon the language of this federal enactment but decided the claim of indemnity in favor of Ryan and against Pan-Atlantic upon the proof which had been adduced.

Upon Pan-Atlantic's appeal, Ryan presented to the U. S. Court of Appeals for the Second Circuit the same argument with respect to the statute here involved. It called the Court's attention to the entire line of cases which had been decided by that Court in which it had taken the position either in direct holding or in dicta that the Act meant exactly what it said, to wit, a complete immunity of the employer (where it had covered its employee with the benefits of the Act) from "all other liability to * * * anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury."

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4 The words are somewhat illumined by the legislative history, however brief and meager it is. Thus, when the Act, as a bill (S. 3170) was introduced on February 17, 1926 by Mr. Cummins it was referred to the Senate Committee on the Judiciary (Cong. Rec., 69th Congress, 1st Session, Vol. 67, p. 4119). It held hearings on March 16, 1926 and on April 2, 1926 (Hearings before a sub-committee of the Committee on the Judiciary, United States Senate, 69th Congress, 1st Session). In Senate Report S. 973, it is stated that (p. 16):

> "Sections (4) (5) and (6) of the bill contain the appropriate provisions for making certain that compensation will be paid, *abolishing liability on the part of the employer except for the payment of the prescribed compensation*, and fixing the time at which compensation begins." (Italics supplied.)

S. 3170, as amended, said amendment not being material to the question at hand, passed the Senate on June 3, 1926 (Cong. Rec. for June 3, 1926, p. 10611) and was later referred to the House Committee on the Judiciary (p. 10820 of Cong. Record for June 7, 1926). H. Rept. 1767, dated January 14, 1927, amended S. 3170, which amendment, although not germane, was eliminated when debated (Cong. Rec., Vol. 68, p. 5402). The meager debates in Congress, the Reports of the House and Senate Committees are completely devoid of even a suggestion that §905 of 33 U. S. C. A. (Section 5 of the Act) does not mean exactly what the explicit language says.

Thus, it was argued to the Court below that in *American Mutual Liability Insurance Co.* v. *Matthews*, 182 F. 2d 322, in dealing with a claim of *contribution* (there being no written contract) and the statute as a defense thereto it had said (p. 324):

> "To impose a non-contractual duty of contribution on the employer is *pro-tanto* to deprive him of the immunity which the statute grants him in exchange for his absolute, though limited, liability to secure compensation to his employees."

In dealing with the effect of §905 of 33 U.S.C.A. as a *release* from a claim of recovery, L. Hand, *Ch.J.*, in a concurring opinion in the cited case said (p. 325):

> "* * * and the reason why I think it should be so construed is that it (the Act) has imposed upon employers an absolute, though limited, liability, in exchange for a release from the preceding unlimited liability, conditional upon negligence." (Parenthetical matter supplied.)

Having disallowed *contribution* on the basis of the statute here involved, the Court below had also disallowed *indemnity*—and this also by reason of the statute.

In *Gill* v. *U. S.*, 184 F. 2d 49, where the United States (shipowner) sought *indemnity* from the employer, Turner & Blanchard, Inc. (Record on Appeal in cited case—folio 45), the question was disposed of in the opinion as follows (p. 55):

> "The dismissal of the cross libel against Turner and Blanchard, Inc., which paid libellant under the provisions of the Longshoremen's and Harbor Workers' Compensation Act was without error. 33 U.S.C.A.

905; American Mutual Liability Ins. Co. v. Matthews, 2 Cir., 182 F. 2d 322."

Eight months after the *American Mutual* case, *supra*, the Court below again had occasion to express its views as to a compensation Act (this time, New Jersey's) being a defense to a claim of *indemnity*. The Court, in an opinion by L. Hand, *Ch.J.*, in *Slattery* v. *Marra Bros.*, 186 F. 2d 134, after reviewing cases dealing with "active"-"passive" negligence said (p. 138):

> "* * * Such cases (dealing with active-passive negligence) may perhaps be accounted for as lenient exceptions to the doctrine that there can be no contribution between joint tortfeasors, *for indemnity is only an extreme form of contribution.*" (Parenthetical matter and italics supplied.)

The Court in holding that *indemnity* was not rationally possible where the putative indemnitor was the employer of the plaintiff (and therefore not liable to the injured plaintiff, his employee) said (p. 139):

> "We cannot, however, agree that that result (indemnity) is rationally possible except upon the assumption that both parties are liable to the same person for the joint wrong." (Parenthetical matter supplied.)

Following this theme the Court then significantly said (p. 139):

> "So far as we can see therefore *there is nobody of sure authority for saying that differences in the degrees of fault will without more strip one of them, if he is an employer, of the protection of a compensation act;* and we are at a loss to see any tenable principle which can support such a result." (Italics supplied.)

The reasoning of the foregoing was reaffirmed by said Court in passing to the actual question for disposition in *LoBue* v. *U. S.*, 188 F. 2d 800, where Judge Frank, writing for a unanimous Court in overruling the contention raised by the ship that indemnity could be obtained from a stevedore for an alleged breach of a stevedore's duty to the shipowner to do the work in a careful and efficient manner said (p. 803):

> "And we do not think that there can be any recovery over of indemnity under the maritime law for Jarka's breach of its duty to the United States to do its work in a careful, efficient manner. The cases which sanction such a liability over on an indemnity theory are inapplicable here, for in those cases, the employer's negligence was the 'sole,' 'active' or 'primary' cause of the libellant's injury. And to permit a partial recovery over on an indemnity theory here would be to sanction an evasion of the rule and the rationale of the Matthews case, supra, by a mere change in nomenclature from 'contribution' to 'indemnity.'"

On June 28, 1951, Judge Abruzzo in *Mikkelsen* v. *The Granville,* 101 F. Supp. 566, dismissed a petition of a shipowner seeking *indemnity* from the injured person's employer. Judge Abruzzo, not finding any contract of indemnity (which is the fact in the case at bar) and relying upon *American Mutual Liability Ins. Co.* v. *Matthews,* 182 F. 2d 322, dismissed the petition for he found that (p. 569):

> "the Longshoremen's and Harbor Workers' Act is a valid defense to that petition."

The petition alleged *inter alia* that the employer failed to properly use the gear and to avoid *creation* of dangerous

conditions (p. 566 of 101 F. Supp., bottom of right hand column).

Remembering that the dismissal of the petition for *indemnity* resulted from exceptive allegations (p. 568 of 101 F. Supp.—top of left hand column) which posed *solely* as a defense the compliance of the employer with the U.S. Longshoremen's and Harbor Workers' Compensation Act, we find that the Court below affirmed the dismissal of the petition, 191 F. 2d 858, in a Per Curiam opinion which tersely said:

> "Affirmed on the authority of American Mutual Liability Ins. Co. v. Matthews, 2 Cir., 182 F. 2d 322."

Rehearing was denied in 192 F. 2d 809.

Other courts have understood the foregoing cases, decided by the Court below, to stand for the proposition that the Act is a complete bar to any claim of recovery over under the law, absent a contract, by the shipowner against the injured workman's employer. In this connection, see

> *Standard Wholesale P. & A. v. Buckert Terminals Corporation*, 1949 A.M.C. 818, 193 Md. 203 (Court of Appeals of Maryland);
>
> *Liberty Mut. Ins. Co. v. Vallendingham*, 94 F. Supp. 17;
>
> *Baird v. John McShain Inc.*, 108 F. Supp. 553.

Then, of course, there are decisions such as *Stafes SS Co. v. Rothschild International Steve. Co.*, 9 Cir., 205 F. 2d 253; *Crawford v. Pope & Talbot, Inc.*, 3 Cir., 206 F. 2d 784; and *Brown v. American-Hawaiian SS Co.*, 3 Cir., 211 F. 2d 16, which have held that the statute is not a bar.

In the case at bar, the Court below bypassed the interpretation of the Act and granted indemnity on *its own*

finding as to proximate cause, contrary to that of the Trial Court. In arriving at the result it did, it inferentially, without any reference to its own decisions, heretofore set forth, overruled said decisions for manifestly had it adhered to them it would have decided this matter as one of law and never reached the question of fact upon which it placed its holding.

The construction to be accorded this Act and the particular section thereof which is here involved has plagued the Courts below and litigants generally. Reference is merely made to the host of decisions in footnote 2 hereof as indicative of the difficulty projected by the Act.

Ryan's position is that it is incumbent upon the respondent herein and all shipowners who seek indemnity from an employer of an injured plaintiff to show by convincing proof that the Congress did not mean what it said in the explicit language it used in §905 of 33 U.S.C.A.

In no decision bearing upon the point, whether it be in support or in refutation of Ryan's contention, has it been shown that Congress intended anything at variance with the plain and explicit wording of §905. Certainly, Pan-Atlantic has not done so here.

The plain and obvious fact is that the Congress never contemplated and therefore had no intention in either direction respecting third party indemnity situations—this, prior to the passage of the Act, here involved, on March 4, 1927.[5] Congress simply intended that the liability

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5 It was not until 11 years thereafter that the N. Y. Court of Appeals held that the N. Y. Workmen's Compensation Act did not furnish a defense to a claim of indemnity by a third person against an employer (*Westchester L. Co. v. Westchester C. S. E. Corp.*, 278 N. Y. 175). Similarly, it was not until 12 years after the passage of the U. S. Longshoremen's and Harbor Workers' Compensation Act that a District Court placed the same gloss upon the federal Act, influenced by the *Westchester* case, *supra*. *Bodden v. Jacka Corporation*, 26 F. Supp. 804.

[Continued on next page]

provided for in the Act should be absolutely exclusive and expressed that intention in §905 of 33 U.S.C.A. (Section 5 of the Act).

That would be the only practical conclusion, irrespective of the explicit wording of §905, in order to make the sections of the Act an harmonious well integrated whole.

If §905 were construed contrary to its plain wording it would result in a stevedore and/or its compensation carrier controverting every claim of compensation, with a possible resultant penalty therefor, in order that a formal award could be obtained. The formal award would then assign to the stevedore or its compensation carrier (§933 [i]) title to the third party action. §933(b) of 33 U.S.C.A. These mechanics would fly in the very teeth of §914 of 33 U.S.C.A. which provides for the *prompt* payment of compensation without an award. Nonetheless, a stevedore or compensation carrier would have to controvert every claim so that upon the formal award and the resulting assignment of title to the third party action it would have control over any third party action. Only by obtaining title in such a matter would its liability become absolute and exclusive.

Surely, Congress did not intend that such mechanics be used in order that the stevedore obtain the "exclusive" liability of which Congress spoke in explicit language.

If the scheme of things is to change, then Congress should legislate further to modify its explicit language.

Certainly, Congressional intent, evidenced by explicit language, cannot be ascertained by decisions which have been handed down 11 and 12 years after Congress had spoken. See for example, *Iacono v. Cardillo*, 208 F. 2d 696.) The stevedore should not impute to Congress an intention which it did not express in the explicit language it employed.

If there is no difference in theory in the maritime law between contribution and indemnity and if said terms merely connote a difference in the *quantum* of recovery, then there can be no indemnity in the absence of any legislation by the Congress authorizing the same in this, a maritime non-collision tort action. This Court has never determined in a maritime non-collision tort case that a shipowner who is held liable to an injured maritime worker can obtain indemnity under the maritime law from said worker's employer.

Research has disclosed no case where this Court has held that there can be indemnity, as implied in the maritime law, in a personal injury case, *i.e.*, non-collision, where the putative indemnitee has been held liable to the putative indemnitor's employee.

Indemnity has been characterized as "an extreme form of contribution." *Slattery* v. *Marra Bros.*, 186 F. 2d 134, 138. Similarly contribution has been characterized as "partial indemnity." *Erie R. Co.* v. *Erie & W. Transp. Co.*, 204 U. S. 220. Preliminarily it would therefore appear that there is no difference in theory between contribution and indemnity and that such terms connote a difference in the *quantum* of recovery, *i.e.*, indemnity in part or full recoupment.

If there is no difference in theory between contribution and indemnity, then the result arrived at by this Court in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, is the touchstone in this matter. Since this Court has not determined whether there can be indemnity in a maritime personal injury action in favor of a shipowner against the employer of the injured maritime worker there would seem to be, as the law stands at present writing, a conflict "in principle" between the holding of the Court below and the *Halcyon* decision, *supra*.

Palazzolo's witnesses described how the rolls of paper pulp were secured by mere pieces of scrap dunnage and how the customary wedges had not been supplied nor used by the ship because Pan-Atlantic didn't believe in wedges.

The uncontradicted testimony of Captain Fisher, who was the cargo mate in charge of the loading and unloading operation, has been heretofore set forth and the same dictated the Trial Court's finding that Captain Fisher had

> "complete knowledge of the loading and unloading operation, the opportunity and ability on his part to discover the defect in stowage at either the loading or unloading port, and his authority to remedy the condition or halt the work" (R. 359).

In view of the foregoing testimony and under the charge of the Trial Court dealing with negligence and unseaworthiness, it is indisputable that inherent in the jury's verdict is the finding that Pan-Atlantic had been negligent by virtue of Captain Fisher's active conduct.

If there can be indemnity, implied by the maritime law between joint tortfeasors, then fundamental principles respecting indemnity, found in the common law, must or should be accepted by the maritime law. One of the fundamental principles is that a putative indemnitee is barred by the wrongful nature of his conduct from obtaining indemnity if as between the putative indemnitee and the putative indemnitor it was the latter's obligation to discharge a certain duty. *Restatement of Restitution*, §76. Further, there can be no indemnity where after discovery of danger the putative indemnitee acquiesces in the continuation of the condition. *Restatement of Restitution*, §95.

In the absence of any authoritative decision from this Court the decisions of the State and Federal Courts dealing with claims of indemnity have employed various phrase-

ology in disposing of said claims. Disposition at times has revolved around "active and passive negligence," "active and passive cause," "primary and secondary negligence," "primary and secondary duty," "primary and secondary cause," "joint tort feasors" and "particeps criminis." Nomenclature has been imprecise at times.

However, one thread binds up all these decisions. The thread common to all or the principle by which contentions for indemnity are parsed is that one who has participated by active conduct in a tort can have no recovery over. *Mikkelsen* v. *The Granville*, 192 F. 2d 809; see excellent discussion in *Falk* v. *Crystal Hall, Inc.*, 200 Misc. 979, aff'd 279 App. Div. 1071; *Phoenix Bridge Co.* v. *Creem*, 102 App. Div. 354, 356, aff'd 185 N. Y. 580; *Edwards* v. *Sophkirsh Holding Corp.*, 280 App. Div. 168, aff'd 304 N. Y. 850; *Adler* v. *Tully & DiNapoli, Inc.*, 274 App. Div. 1001, aff'd 300 N. Y. 662; *Dolnick* v. *Edward Donner Lumber Corp.*, 275 App. Div. 954, aff'd 300 N. Y. 660.

Since it is fundamental learning that indemnity, as implied by the common law in certain circumstances, is an equitable doctrine and that the delinquencies of the parties are to be weighed on the basis of the ethical quality of their tortious acts, it was, it is respectfully submitted, gross inequity for the Court below to have reversed the Trial Court and to have granted indemnity in favor of Pan-Atlantic (assuming *arguendo* that indemnity exists in the maritime law in a personal injury action) where Pan-Atlantic, the putative indemnitee, had been found by the jury by virtue of its general verdict to have *furnished* improper gear and to have been in complete control of the operation of loading and discharging the vessel.

If indemnity exists under the maritime law where the parties are aligned as they are in the instant matter then to allow a recovery over by Pan-Atlantic against the petitioner herein would also place a premium on inaction

(*Falk v. Crystal Hall*, 200 Misc. 979, 985, aff'd 279 App. Div. 1071) and allow a shipowner to point his finger at a stevedoring firm and say

> "I am furnishing you with defective equipment but I have a right over against you in the event that one of your employees is injured thereby. I also observe your loading and discharging operations and they are all right with me now but if a court or jury should hereafter hold that I guessed wrong then the court will allow me to get indemnity from you although at this time I am folding my arms and telling you that you are properly performing your stevedoring services."

In determining that the "sole" "active" or "primary" *cause* of the accident was the negligence of petitioner, the Court below has reversed a finding of fact respecting proximate cause made by the Trial Court, whose exclusive province it was to make such a finding. In reversing the Trial Court's finding of fact respecting proximate cause, the Court below has ruled contrary to Rule 52(a) of the Federal Rules of Civil Procedure and has injected uncertainty with respect to the limits or scope of appellate review in non-jury cases.

If indemnity exists in the maritime law in favor of a shipowner against the employer of an injured maritime worker in a personal injury action, then admiralty has adopted, although never so held by this Court, that there are different degrees of fault or negligence between tortfeasors which different degrees of negligence constitute tortfeasors either "active" or "passive."

As has been said by the New York Court of Appeals in *McFall v. Compagnie Maritime Belge*, 304 N. Y. 314, 328:

"Whether negligence is passive or active is, generally speaking, a question of fact for the jury."

If Pan-Atlantic and Ryan had not stipulated that all questions of fact and law were to be tried and to be determined exclusively by the Trial Court, without benefit of a jury, then in the normal course of procedure the entire case would have gone to the jury for determination in contrast to merely Palazzolo's right of recovery against Pan-Atlantic. Had the jury decided, as the Trial Court actually did in this case, that Pan-Atlantic and Ryan were joint tortfeasors and that Pan-Atlantic was not entitled to recover indemnity from Ryan, we think it could not be gainsaid that the Court below would have been limited on its review to determining whether there was evidence to support the finding of the jury. Where the Trial Court has become, pursuant to the stipulation of Pan-Atlantic and Ryan, the trier of the facts respecting the right of indemnity, does not the same rule or yardstick apply respecting the scope or limit of review by the Court below?

Manifestly, in order to have arrived at the conclusion it did the Trial Court must have inherently found that the negligence of Pan-Atlantic and Ryan caused or contributed to the happening of the accident. Such a question of causation is a question of fact. *F. E. Granciller Transportation Co., Inc.* v. *Gallagher Sand & Gravel Corporation*, 153 F. 2d 384, 385.

Without any justification except its own views or the inferences which it drew from the record, where all of the witnesses were heard in open court by the Trial Court, the Court below determined that the "sole" "active" or "primary" *cause* of the accident to Palazzolo was the negligence of Ryan. Completely overlooked and, indeed, not even mentioned by the Court below, was the Trial Court's

finding, as reflected by the testimony which the Trial Court set forth *in extenso* in its opinion, that Pan-Atlantic affirmatively and actively, through its Captain Fisher, caused and participated in bringing the accident about.

In reversing the finding of the Trial Court, which finding is completely supported by the record, the Court below has projected uncertainty as to the scope of appeals in admiralty or non-jury actions, the resolution of which question in the proper operation of the federal system of appellate review should, it is respectfully submitted, be considered by this Court.

WHEREFORE, this case, it is respectfully submitted, merits the decision of this Court.

Respectfully submitted,

RYAN STEVEDORING CO., INC.

BY SIDNEY A. SCHWARTZ
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. ~~157~~ 41

RYAN STEVEDORING CO., INC.,

Petitioner,

—v.—

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

REPLY BRIEF OF PETITIONER

SIDNEY A. SCHWARTZ
Counsel for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 157

RYAN STEVEDORING CO., INC.,

Petitioner.

—v.—

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

REPLY BRIEF OF PETITIONER

The brief of Pan-Atlantic Steamship Corporation in opposition to the petition herein would have this Court believe that the facts in this litigation are peculiar or unique. It is to be assumed that every respondent on the submission of a petition to this Court makes the same statement in an attempt to have the petition denied.

However, not only do the questions presented by the petitioner permeate *all* litigation (cf. *Berti* v. *Compagnie de Navigation Cyprien Fabre,* 213 F. 2d 397, 398) but they project problems to the stevedoring industry in its securing proper and adequate insurance coverage to cover the type of liability for which the petitioner has been held liable.

The brief of the National Association of Stevedores, as *amicus curiae,* an association representing 150 stevedoring firms in 39 different ports in the United States, points

up the importance to the industry of the questions presented by the petitioner.

The facts in this case which project the main question are not novel, despite the respondent's misleading protestations to the contrary. The main question which is presented respecting the construction of the Act and the right of indemnity is omnipresent in maritime personal injury litigation.

One of the questions of law that is presented to this Court is whether there can be indemnity under the general maritime law in connection with a condition allegedly created by an independent contractor upon the premises of another. Indemnity, as implied by the common law, in contrast to the general maritime law, has been allowed where a dangerous condition has been created by an independent contractor upon the premises of another.

Whether this same kind of land based indemnity, *i.e.*, implied by the common law, absent any express contract, can be granted under the general maritime law to a shipowner for the alleged creation of a dangerous condition upon his premises (a vessel) has never been determined by this Court. Indeed, the respondent cites no decision of this Court which determines this problem or points the way to decision. This is in contrast to the main brief of the petitioner which explores the entire reservoir of decisional law which points the way to decision in favor of petitioner's contentions. (See pages 22 to 25 of petitioner's brief.)

The respondent would also by oblique reference to "breach of contract" have this Court assume that there was an express contract which determined the rights and obligations in this matter although it has admitted, as it inevitably must, that there was no formal contract that existed between the parties to this litigation. There is no

contract which governs the questions that have been posed by the petitioner herein.

There is no peculiar set of facts which projects the questions presented by the petitioner. Indeed, as the U. S. Court of Appeals for the Second Circuit recently (May 26, 1954) said in *Berti* v. *Compagnie de Navigation Cyprien Fabre*, 213 F. 2d 397, 398, and which statement completely encompasses the instant litigation:

> "This appeal involves the *recurring problems* of liability of a vessel owner to an injured employee of the stevedore it has hired to load or unload the vessel and of the liability of the stevedore for indemnity to the vessel owner." (Italics supplied.)

The problem which is presented by the instant petition, relating to the construction of the U. S. Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. § 901 *et seq.*, as integrated with any indemnity that may be implied in law in maritime non-collision cases, has been the subject of a host of decisions. It is in no way unique, as has been shown in footnote 2 at page 8 of the petition of Ryan Stevedoring Co., Inc. However much the respondent writhes and inveighs against the petitioner's contentions respecting the wording of § 905 of 33 U. S. C. A., and however much the respondent contends that compensation is the exclusive remedy for the employee, his kin, assignees, or anyone else who claims through him (Resp. Brief, p. 9, which it has italicized) nowhere in § 905 of 33 U. S. C. A. will such language be found. Indeed, the Congressional language was all embracing for the statute reads "and *anyone* otherwise entitled to recover damages from such employer • • • ."

The questions presented by the petition are not questions *in vacuo*. They arise every day in litigation which

stems from an injury to a longshoreman aboard a vessel. That they will arise even more frequently in the future has been shown by the petitioner at page 10 of its petition and has been referred to in the dictum of the U. S. Court of Appeals for the Second Circuit in *Berti* v. *Compagnie de Navigation Cyprien Fabre*, 213 F. 2d 397. By the decision of the U. S. Court of Appeals for the Second Circuit in this and the *Berti* cases, the stevedore has become the insurer of the shipowner. The shipowner by this Court's decision in *Alaska SS Co.* v. *Petterson*, 347 U. S. 396, has become the insurer of the safety of all persons who come on board its vessel no matter how said persons are injured. *Sequitur*, the stevedore will always be called upon to indemnify the shipowner for judgments obtained against it by the stevedore's injured employees.

If the stevedore is not insulated from liability for a claim of indemnity in such a situation by reason of the very wording of § 905 of 33 U. S. C. A., then it must obtain, if it can, proper and adequate insurance protection.

The stevedore, if it is exposed to such a type of liability, must go into the open insurance market and attempt to purchase, however prohibitive the cost, coverage for liability imposed upon it by law, not contract, if it is impleaded by a shipowner who has been sued by the stevedore's injured employee. The only policy that would afford protection in such a case is a workmen's compensation employers' liability policy, properly endorsed (cf. *Cardinal* v. *State of New York*, 304 N. Y. 400).

In the instant matter the petitioner's compensation carrier* not only covered the petitioner for compensation but

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* The respondent in its brief in opposition has injected the question of insurance as though that was a consideration which should affect the granting or denial of a writ of certiorari. The insurance that is involved in this matter,

issued appropriate endorsement to cover any liability within certain financial limits, which was imposed by law (not contract), for damages on account of injuries to an employee where said employee has brought suit against another and that other brings a suit or claim against the employer. This refutes entirely the respondent's argument at pages 18 and 19 of its brief that a compensation carrier has no interest in an action of this type after it has received reimbursement of all amounts expended on behalf of the injured longshoreman. It has an interest in every instance of this kind and is vitally affected by this type of litigation.

By virtue of the limited coverage ($25,000) which is provided to the petitioner, the latter, as do all stevedoring firms with the customary limited coverage, has a major interest in the problems presented. The representation of the National Association of Stevedores in this matter by its motion for leave to be joined as an *amicus curiae* was not an idle gesture. It was manifestly prompted by the stevedoring industry's concern over the position it finds itself in by reason of the holding in this case.

It is respectfully submitted that this case and the questions presented merit the decision of this Court.

Respectfully submitted,

RYAN STEVEDORING CO., INC.

By SIDNEY A. SCHWARTZ
Counsel for Petitioner

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if it is important at all, will be discussed *infra*. As this Court well knows "substantially all maritime risks are insured" (*Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515, 518) and the petition for certiorari in this matter not only embraces the stevedoring industry but the insurance carriers who write the type of coverage involved.

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In the

Supreme Court of the United States

OCTOBER TERM—1954

No. ~~167~~ 41

RYAN STEVEDORING CO., INC.,

Petitioner,

—v.—

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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In the

Supreme Court of the United States

October Term—1954

No. 157

Ryan Stevedoring Co., Inc.,

Petitioner,

—v.—

Pan-Atlantic Steamship Corporation,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR PETITIONER

This case comes before the Court on writ of certiorari issued to review a final judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below

The opinion of the United States District Court is officially reported in 111 F. Supp. 505. The opinion of the United States Court of Appeals for the Second Circuit is officially reported in 211 F. 2d 277 and appears at page 369 of the Transcript of Record.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on March 25, 1954. The petition was filed on June 21, 1954 and was granted on

October 14, 1954. The jurisdiction of this Court rests on Title 28 of the United States Code, Section 1254 (1).

Questions Presented

(1) Is a contracting-stevedore, who complies with the provisions of the U.S. Longshoremen's and Harbor Workers' Compensation Act, Title 33, United States Code, §901 *et seq.*, insulated under the very wording of the Act (§905) from any claim or action in which full indemnity (there being no express contract of indemnity) is sought against him by a shipowner who has been held liable to an employee of the contracting stevedore.

(2) If the aforesaid Act, as worded, does not furnish complete immunity to a contracting stevedore against a claim of indemnity, implied in law, of a shipowner who has been liable to an injured employee of the contracting stevedore, can there be indemnity implied in the maritime law (there being no express contract of indemnity) between joint tortfeasors in a non-collision case, *i.e.*, a personal injury action.

(3) After the jury had rendered a verdict in favor of the injured longshoreman against the shipowner herein, Pan-Atlantic Steamship Corporation, the Trial Judge, sitting without a jury, pursuant to stipulation of the parties, decided all questions of fact and law respecting the shipowner's right of indemnity. Where the Trial Judge as the trier of the facts in a non-jury action has found that the shipowner and the contracting stevedore were joint tortfeasors, which is equivalent to a determination that the negligence of each caused or contributed to the

accident, can an Appellate Court on review of the Trial Judge's findings in a non-jury case disregard his findings of causation and draw its own conclusions as to causation where it could not do so had a jury been the trier of the facts.

Statute Involved

The provision of the U.S. Longshoremen's and Harbor Workers' Compensation Act, Title 33, United States Code, §901 *et seq.*, which is involved is §905 thereof which reads as follows:

"Exclusiveness of liability. The liability of an employer prescribed in section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee. (Mar. 4, 1927, c. 509, §5, 44 Stat. 1426.)"

Statement

On July 20, 1949 one, Frank Palazzolo, a longshoreman employed by Ryan Stevedoring Co., Inc., hereinafter referred to as Ryan or petitioner, was injured aboard the S.S. Canton Victory, lying in navigable waters in the port of New York, when he was struck by a roll of paper pulp during said vessel's discharge at Brooklyn, New York.

The S.S. Canton Victory was operated, managed and controlled by Pan-Atlantic Steamship Corporation, hereinafter referred to as Pan-Atlantic or respondent.

The loading of the cargo of paper pulp was performed at Georgetown, S. C., by petitioner, as was the discharge of the vessel at Brooklyn, N. Y.

To recover pecuniary damages for the personal injuries sustained by him, Palazzolo instituted an action against Pan-Atlantic in the Supreme Court of the State of New York, County of Kings, and Pan-Atlantic removed said action to the United States District Court for the Eastern District of New York.

In his complaint against Pan-Atlantic (R. 7-9) Palazzolo alleged that Pan-Atlantic had negligently caused, suffered and permitted rolls of paper pulp to be loaded and transported negligently and had failed to furnish a seaworthy vessel. The theory of Palazzolo's case was that a roll of paper pulp, which had not been "chocked" properly, had jumped out of its tier during the discharge of the rolls of paper pulp and had crushed his leg.

After the action had been removed, Pan-Atlantic impleaded Ryan (R. 10) and sought *indemnity* on allegations that Ryan was exclusively in control of the portion of the vessel where Palazzolo was hurt (R. 12) and that if the rolls of paper pulp were loaded improperly on the S.S. Canton Victory and if the vessel were unseaworthy then said condition had been caused solely by Ryan.

At the opening of trial before Senior Judge Inch of the United States District Court, Eastern District of New York, it was conceded that Ryan had complied with the provisions of the U.S. Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §901 *et seq.*, and that in addition to compensation benefits there had been paid by Ryan's compensation carrier $9857.36 representing medical expenses in treating Palazzolo (R. 46).

It was also stipulated between Pan-Atlantic and Ryan that all proof dealing with the claimed right of indemnity of Pan-Atlantic against Ryan was to be adduced before the Trial Court at the same time that Palazzolo tried his jury action against Pan-Atlantic and that the Trial Court, without benefit of jury, would determine as a matter of *fact* and *law* Pan-Atlantic's claimed right of indemnity or recovery over.

In accordance with the allegations of Palazzolo's complaint, and in line with the theory upon which Palazzolo's action had been tried, the jury was charged as to unseaworthiness and negligence. The jury rendered a general verdict of $75,000 against Pan-Atlantic (R. 304) upon which judgment was entered.

The Trial Court, in accordance with the stipulation between Pan-Atlantic and Ryan, having heard all of the witnesses in open court (there being no testimony adduced by way of deposition), handed down its decision (R. 316-319; 111 F. Supp. 505) denying any right of indemnity in favor of Pan-Atlantic and granting judgment to Ryan dismissing Pan-Atlantic's third party complaint.

Although Ryan urged to the Trial Court that its compliance with the U.S. Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, and particularly §905 thereof, insulated Ryan completely from any claim of *indemnity*, the Trial Court preferred to place

its dismissal of Pan-Atlantic's third party complaint upon the findings of fact which it set forth in its opinion (R. 316-319; pp. 506 and 507 of 111 F. Supp.). They revolve around the *uncontradicted* testimony of Pan-Atlantic's own cargo mate, Captain Fisher, showing his control over the entire operation of loading and discharging the S.S. Canton Victory.

This *uncontradicted* testimony shows that although it was Ryan's job to load the S.S. Canton Victory at Georgetown it had to be done "however to the general satisfaction of the mate in charge of the vessel, the master, and the chief officer and his under officers" (R. 214). Captain Fisher's job was to go in and out of the five holds to check to see that Ryan was loading the cargo properly and chocking it for his "primary job, of course, was watching the cargo, this is in port, and to see that it is loaded and stowed properly for the safety of the vessel and the cargo and the crew that sails the vessel" (R. 234). He recognized that his job of supervision was important in so far as it also involved the safety of the longshoremen who came on board to discharge the vessel (R. 251). The Trial Court, completely supported by the record, found as a fact (R. 318) that

> "the cargo mate was in hold No. 3, where the accident occurred, both at the time of loading and unloading to see that everything was properly done and that he was 'primarily concerned to check the damage or the pilferage or *any unsafe method or practice.*'" (Single quoted matter and italics so indicated in original opinion.)

The Trial Court found that according to the cargo mate everything was done properly by Ryan and no complaints were made by him (R. 318).

The ultimate finding of the Trial Court, which sums up appropriately all of the uncontradicted testimony given by the cargo mate, is this (R. 319):

> "Captain Fischer's (sic) own testimony shows his complete knowledge of the loading and unloading operation, the opportunity and ability on his part to discover the defect in stowage at either the loading or unloading port, and his authority to remedy the condition or halt the work."

The Trial Court in denying indemnity to Pan-Atlantic concluded that Pan-Atlantic and Ryan were joint tort-feasors.

Pan-Atlantic appealed from the judgments entered in Palazzolo's and Ryan's favor.

The U. S. Court of Appeals for the Second Circuit affirmed the judgment in favor of Palazzolo but reversed the judgment in Ryan's favor and directed judgment in favor of Pan-Atlantic against Ryan (R. 324-327; 211 F. 2d 277).

Ryan's petition for a writ of certiorari was granted by this Court on October 14, 1954.

Summary of Argument

I. Ryan has complied fully with the U.S. Longshoremen's and Harbor Workers' Compensation Act, Title 33, United States Code, §901 *et seq.* Under the clear and explicit language of §905 of that Act, the Congress in 1927, with no modifications since that date, has stated that the liability of an employer, as prescribed by the Act "shall be exclusive and in place of all other liability of such employer to * * * anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury

* * * ." By that unambiguous language, the statute here involved is a complete bar to any claim of Pan-Atlantic for indemnity implied in law against Ryan. If the statute was not intended to exonerate an employer such as Ryan from a claim of the kind here involved, then the remedy is with the Congress to modify the language which it employed some 27 years ago.

II. If §905 of 33 U.S.C. is not a complete bar, then there should still be no recovery over based upon indemnity implied (there being no contract of indemnity in this matter) under the maritime decisional law in this, a maritime non-collision tort action. Since this Court has held in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, that there can be no contribution between tortfeasors in a maritime non-collision case in the absence of federal legislation allowing the same and since contribution is only "partial indemnity" (*Erie R. Co.* v. *Erie & W. Transp. Co.*, 204 U. S. 220; *Slattery* v. *Marra Bros.*, 186 F. 2d 134, 138 [C.A. 2]), it would follow on "principle" that there should be no indemnity implied in the maritime law in a maritime non-collision tort case in the absence of federal legislation sanctioning the same.

III. Where the Trial Court, sitting without a jury, has made certain findings of fact respecting the negligence of the parties to the litigation having caused or contributed to an accident to a longshoreman, and said findings flow logically and reasonably from, and are completely supported by, the record, a United States Court of Appeals is in error when it draws inferences contrary to that of the Trial Court. *McAllister* v. *United States*, decided November 8, 1954, not officially reported, unofficially reported in 75 S. Ct. 6.

ARGUMENT

POINT I

Ryan's compliance with the U.S. Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. §901 *et seq.*, is a complete bar to any claim of indemnity by Pan-Atlantic against Ryan.

The first question that petitioner presents to this Court is the meaning to be ascribed to the explicit language which the Congress employed in the "exclusive remedy" provision of the U.S. Longshoremen's and Harbor Workers' Compensation Act, §905 of Title 33 of the United States Code, in so far as it bears upon and controls claims of indemnity (implied in law)[1] by shipowners against stevedores in personal injury actions arising out of maritime torts. The question of the judicial construction to be accorded §905 of Title 33, United States Code, is singularly important to the shipping industry for in every port of the United States where stevedoring of vessels takes place and accidents arise therefrom it is a foregone conclusion that an injured longshoreman will bring action against the shipowner who in turn will implead the stevedore-employer and seek indemnity implied in law or otherwise.

This type of hydra-headed litigation is omnipresent and all courts which have been confronted[2] in recent times with

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1 It is conceded in the case at bar that there is no contractual provision for indemnity (R. 272). Therefore, the argument of the petitioner will not concern itself with provisions of various contracts by which a stevedore has agreed to indemnify a shipowner under certain circumstances and thereby divests himself of the aegis of the statute.

2 Thus, we find the problem decided or discussed within rather recent times in the following opinions: *American Mutual Liability Insurance Co.* v.

the problem of the judicial construction to be placed upon this federal statute, whether it be in *contribution* or *indemnity* actions, have gone in all directions.

This Court in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, decided January 14, 1952, 342 U. S. 282, 72 S. Ct. 277, found it unnecessary to determine whether §905 (Section 5 of the Act) was a bar to a claim of *contribution* for it based its decision on other grounds. Research has disclosed no case to the present where this Court has been called upon to point the way out of the morass and welter of confusion which results from a reading of the decisions of the lower courts which are set forth in footnote 2 hereof.

The path out of the judicial morass, projected by the authorities set forth in footnote 2 hereof, is, we submit, clearly outlined. The statute, without judicial legislation, by gloss or otherwise, should be held to be the "exclusive" liability which the Congress stated it to be in language that admits of no doubt. If the result is harsh to shipowners, then resort should be had to the Congress to modify the statute, as was indicated by this Court in a comparable

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Matthews, 2 Cir., 182 F. 2d 322; *Gill* v. *U. S.*, 2 Cir., 184 F. 2d 49; *Slattery* v. *Marra Bros.*, 2 Cir., 186 F. 2d 134; *Mikkelsen* v. *The Gigville*, 2 Cir., 191 F. 2d 858; *States SS Co.* v. *Rothschild International Stevedoring Co.*, 9 Cir., 205 F. 2d 253; *Crawford* v. *Pope & Talbot Inc.*, 3 Cir., 206 F. 2d 784; *Brown* v. *American-Hawaiian SS Co.*, 3 Cir., 211 F. 2d 16; *Union Sulphur & Oil Corp.* v. *W. J. Jones & Son*, 9 Cir., 195 F. 2d 93; *Standard Wholesale P. & A* v. *Ruckert Terminals Corporation*, 1949 A. M. C. 818, 193 Md. 20; *Liberty Mutual Ins. Co.* v. *Fallendingham*, 94 F. Supp. 17; *Baird & McShain Inc.*, 108 F. Supp. 553; *Coates* v. *Potomac Electric Power Co.*, 95 F. Supp. 779, 96 F. Supp. 1019; *Miranda* v. *City of Galveston*, 98 F. Supp. 245; *Lundberg* v. *Prudential Steamship Corp.*, 102 F. Supp. 115; *Valerio* v. *American President Lines*, 112 F. Supp. 202; *Dubetz* v. *North American Shipping Co.*, not officially reported, reported in 1951 A. M. C. 492; *Lukasiewicz* v. *Moore-McCormack Lines*, 104 F. Supp. 572; *Barber SS Lines* v. *Quinn Bros.*, 104 F. Supp. 78.

26 F. Supp 304

situation in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282.

The factual situation which spawns the question of law presented under this Point is this.

Upon the trial of this matter it was conceded (R. 46):

> "that Ryan Stevedoring Co., Inc., in compliance with the terms of U.S. Longshoremen's and Harbor Workers' Compensation Act, in pursuance thereto there were paid by the compensation carrier for Ryan Stevedoring Company certain sums for compensation and $9857.36 as medical expenses, the reasonableness of which medical expenses is conceded by all concerned."

Having therefore complied with the provisions of the statute dealing with compensation, 33 U.S.C.A. §904, and with medical services, 33 U.S.C.A. §907, Ryan invoked as a defense (R. 15-16) and presented to the Trial Court for determination the effect of §905 of 33 U.S.C.A. which reads as follows:

> "The liability of an employer prescribed in section 904 of this chapter *shall be exclusive and in place of all other liability of such employer to* the employee, his legal representative, husband or wife, parents, dependents, next of kin, and *anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury* * * *" (Italics supplied.)

These words are clear, unambiguous and unequivocal and no aids to legislative intent need be sought in this instance. The unequivocal language is a compelling guide to legislative intention (*United States* v. *American Trucking Associations*, 310 U. S. 534, 543 n. 18; *Schwegmann Bros.* v.

Calvert Distillers Corp., 341 U. S. 384, 390-395). If any aids to legislative intent were sought, they would aid Ryan's contention, if at all.[3]

The Trial Court did not place its exoneration of Ryan upon the language of this federal enactment but decided the claim of indemnity in favor of Ryan and against Pan-Atlantic upon the factual proof which had been adduced.

Upon Pan-Atlantic's appeal, Ryan presented to the U. S. Court of Appeals for the Second Circuit the same argument which it had presented to the Trial Court with respect to the statute here involved. It called the Court's attention to the entire line of cases which had been decided by that Court in which it had taken the position either in direct holding or in dicta that the Act meant exactly what it said, to wit, a complete immunity of the employer (where it had covered its employee with the benefits of the Act) from "all other liability to * * * anyone otherwise

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3 The words are somewhat illumined by the legislative history, however brief and meager it is. Thus, when the Act, as a bill (S. 3170) was introduced on February 17, 1926 by Mr. Cummins it was referred to the Senate Committee on the Judiciary (Cong. Rec., 69th Congress, 1st Session. Vol. 67, p. 4119). It held hearings on March 16, 1926 and on April 2, 1926 (Hearings before a sub-committee of the Committee on the Judiciary, United States Senate, 69th Congress, 1st Session). In Senate Report S. 973, it is stated that (p. 16):

> "Sections (4) (5) and (6) of the bill contain the appropriate provisions for making certain that compensation will be paid, *abolishing liability on the part of the employer except for the payment of the prescribed compensation*, and fixing the time at which compensation begins." (Italics supplied.)

S. 3170, as amended, said amendment not being material to the question at hand, passed the Senate on June 3, 1926 (Cong. Rec. for June 3, 1926, p. 10614) and was later referred to the House Committee on the Judiciary (p. 10820 of Cong Record for June 7, 1926). H. Rept. 1767, dated January 14, 1927, amended S. 3170, which amendment, although not germane, was eliminated when debated (Cong. Rec., Vol. 68, p. 5402). The meager debates in Congress, the Reports of the House and Senate Committees are completely devoid of even a suggestion that §905 of 33 U. S. C. A. (Section 5 of the Act) does not mean exactly what the explicit language says.

entitled to recover damages from such employer at law or in admiralty on account of such injury."

Thus, it was argued to the Court below that in *American Mutual Liability Insurance Co.* v. *Matthews*, 182 F. 2d 322, in dealing with a claim of *contribution* (there being no written contract) and the statute as a defense thereto it had said (p. 324):

> "To impose a non-contractual duty of contribution on the employer is *pro-tanto* to deprive him of the immunity which the statute grants him in exchange for his absolute, though limited, liability to secure compensation to his employees."

In dealing with the effect of §905 of 33 U.S.C.A. as a *release* from a claim of recovery, L. Hand, *Ch.J.*, in a concurring opinion in the cited case said (p. 325):

> "* * * and the reason why I think it should be so construed is that it (the Act) has imposed upon employers an absolute, though limited, liability, in exchange for a release from the preceding unlimited liability, conditional upon negligence." (Parenthetical matter supplied.)

Having disallowed *contribution* on the basis of the statute here involved, the Court below had also disallowed *indemnity*—and this also by reason of the statute.

In *Gill* v. *U. S.*, 184 F. 2d 49, where the United States (shipowner) sought *indemnity* from the employer, Turner & Blanchard, Inc. (Record on Appeal in cited case—folio 45), the question was disposed of in the opinion as follows (p. 55):

> "The dismissal of the cross libel against Turner and Blanchard, Inc., which paid libellant under the provi-

sions of the Longshoremen's and Harbor Workers' Compensation Act was without error. 33 U.S.C.A. §905; American Mutual Liability Ins. Co. v. Matthews, 2 Cir., 182 F. 2d 322."

Eight months after the *American Mutual* case, *supra*, the Court below again had occasion to express its views as to a compensation Act (this time, New Jersey's) being a defense to a claim of *indemnity*. The Court, in an opinion by L. Hand, *Ch.J.*, in *Slattery* v. *Marra Bros.*, 186 F. 2d 134, after reviewing cases dealing with "active"-"passive" negligence said (p. 138):

"* * * Such cases (dealing with active-passive negligence) may perhaps be accounted for as lenient exceptions to the doctrine that there can be no contribution between joint tortfeasors, *for indemnity is only an extreme form of contribution.*" (Parenthetical matter and italics supplied.)

The Court in holding that *indemnity* was not rationally possible where the putative indemnitor was the employer of the plaintiff (and therefore not liable to the injured plaintiff, his employee) said (p. 139):

"We cannot, however, agree that that result (indemnity) is rationally possible except upon the assumption that both parties are liable to the same person for the joint wrong." (Parenthetical matter supplied.)

Following this theme the Court then significantly said (p. 139):

"So far as we can see therefore *there is nobody of sure authority for saying that differences in the degrees of fault will without more strip one of them, if he is*

an employer, of the protection of a compensation act; and we are at a loss to see any tenable principle which can support such a result." (Italics supplied.)

That there must be two parties who are *subject to a tort claim* before one of said parties is entitled to obtain indemnity from the other is found in the *A.L.I. Restatement of Restitution §86*:

"A person who has discharged *a tort claim to which he and another were subject* is entitled to indemnity or contribution from the other in accordance with the rules stated in §§76-85, except to the extent that the character of his conduct precludes restitution." (Italics supplied.)

Since an employer cannot be *subject to a tort claim with another* at the hands of his own employee (where said employer has covered his employee with the benefits obtainable under the Compensation Act here involved), the principle enunciated by Judge L. Hand in *Slattery* v. *Marra Bros.*, 186 F. 2d 134, 139, finds support in the *Restatement of Restitution §86.*

The reasoning of the foregoing was reaffirmed by said Court in passing to the actual question for disposition in *LoBue* v. *U. S.*, 188 F. 2d 800, where Judge Frank, writing for a unanimous Court, in overruling the contention raised by the ship that indemnity could be obtained from a stevedore for an alleged breach of a stevedore's duty to the shipowner to do the work in a careful and efficient manner, said (p. 803):

"And we do not think that there can be any recovery over of indemnity under the maritime law for Jarka's breach of its duty to the United States to do its work

in a careful, efficient manner. The cases which sanction such a liability over on an indemnity theory are inapplicable here, for in those cases, the employer's negligence was the 'sole,' 'active' or 'primary' cause of the libellant's injury. And to permit a partial recovery over on an indemnity theory here would be to sanction an evasion of the rule and the rationale of the Matthews case, supra, by a mere change in nomenclature from 'contribution' to 'indemnity.'"

Following along the chronological judicial path, we find that on June 28, 1951 Judge Abruzzo in *Mikkelsen* v. *The Granville*, 101 F. Supp. 566, dismissed a petition of a shipowner seeking *indemnity* from the injured person's employer. Judge Abruzzo, not finding any contract of indemnity (which is the fact in the case at bar) and relying upon *American Mutual Liability Ins. Co.* v. *Matthews*, 182 F. 2d 322, dismissed the petition for he found that (p. 569):

"the Longshoremen's and Harbor Workers' Act is a valid defense to that petition."

The petition alleged *inter alia* that the employer failed to properly use the gear and to avoid *creation* of dangerous conditions (p. 566 of 101 F. Supp., bottom of right hand column).

Remembering that the dismissal of the petition for *indemnity* resulted from exceptive allegations (p. 568 of 101 F. Supp.—top of left hand column) which posed *solely* as a defense the compliance of the employer with the U.S. Longshoremen's and Harbor Workers' Compensation Act, we find that the U. S. Court of Appeals, Second Circuit, affirmed the dismissal of the petition, 191 F. 2d 858, in a *Per Curiam* opinion which tersely said:

"Affirmed on the authority of American Mutual Liability Ins. Co. v. Matthews, 2 Cir., 182 F. 2d 322."

Rehearing was denied in 192 F. 2d 809.

With the foregoing as the judicial reservoir in the Second Circuit, let us see what other jurisdictions have done.

It would be a disservice to the Court of Appeals of Maryland for the petitioner to paraphrase the reasoning of said Court in writing on the federal Act here involved in *Standard Wholesale Phosphate & Acid Works Inc.* v. *Rukert Terminals Corporation*, 193 Md. 20, 1949 A.M.C. 818. We respectfully refer the Court to pages 29 and 30 of 193 Md. for the reasons which dictated said Court to conclude that the statute here involved was a complete bar, by the very wording of the statute, to a claim of indemnity or contribution. It was there held that a shipowner was within the Congressional language of "anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury." To the same effect, see *Liberty Mut. Ins. Co.* v. *Vallendingham*, 94 F. Supp. 17, 18; *Baird* v. *John McShain Inc.*, 108 F. Supp. 553.

Then, of course, there are decisions such as *States SS Co.* v. *Rothschild International Steve. Co.*, 9 Cir., 205 F. 2d 253 and *Crawford* v. *Pope & Talbot, Inc.*, 3 Cir., 206 F. 2d 784, which have held that the statute is not a bar.

With this background we find that in the case at bar the Court below bypassed the interpretation of the Act and granted indemnity on *its own finding* as to proximate cause, contrary to that of the Trial Court. In arriving at the result it did, it inferentially, without any reference to its own decisions, heretofore set forth, overruled said decisions for, manifestly, had it adhered to them it would have decided this matter as one of law and never reached the question of fact upon which it placed its holding.

Ryan's position is that it is incumbent upon the respondent herein and all shipowners who seek indemnity from a stevedore-employer of an injured plaintiff to show by convincing proof that the Congress did not mean what it said in the explicit language it used in §905 of 33 U.S.C.A.

In no decision bearing upon the point, whether it be in support or in refutation of Ryan's contention, has it been shown that Congress intended anything at variance with the plain and explicit wording of §905. Certainly, Pan-Atlantic has not done so at either the trial or the appellate level.

If Congress simply intended that the liability provided for in the Act should be absolutely exclusive, on March 4, 1927,[4] when the Act, here involved, was passed, it expressed that intention in the language that is found in §905 of 33 U.S.C.A. (Section 5 of the Act).

That would be the only practical conclusion, irrespective of the explicit wording of §905, in order to make the sections of the Act an harmonious well integrated whole.

If §905 were construed contrary to its plain wording it would result in a stevedore and/or its compensation carrier controverting every claim of compensation, with a possible resultant penalty therefor, in order that a formal award

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4 It was not until 11 years thereafter that the N. Y. Court of Appeals held that the N. Y. Workmen's Compensation Act did not furnish a defense to a claim of indemnity by a third person against an employer (*Westchester L. Co.* v. *Westchester C. S. E. Corp.*, 278 N. Y. 175). Similarly, it was not until 12 years after the passage of the U.S. Longshoremen's and Harbor Workers' Compensation Act that a District Court placed the same gloss upon the federal Act, influenced by the *Westchester* case, *supra*. *Federii* v. *Jarka Corporation*, 26 F. Supp. 304.

Certainly, Congressional intent, evidenced by explicit language, cannot be ascertained by decisions which have been handed down 11 and 12 years after Congress had spoken. (See, for example, *Iacone* v. *Cardillo*, 208 F. 2d 696.) The stylish trend of impleader cannot ascribe to Congress an intention which it did not mirror in the explicit language it employed.

could be obtained. The formal award would then assign to the stevedore or its compensation carrier (§933 [i]) title to the third party action. §933(b) of 33 U.S.C.A. These mechanics would fly in the very teeth of §914 of 33 U.S.C.A. which provides for the *prompt* payment of compensation without an award. Nonetheless, a stevedore or compensation carrier would have to controvert every claim so that upon the formal award and the resulting assignment of title to the third party action it would have control over any third party action. Only by obtaining title in such a matter would its liability become absolute and exclusive.

Surely, Congress did not intend that such mechanics be used in order that the stevedore obtain the "exclusive" liability of which Congress spoke in explicit language.

Where the Congress has in clear and explicit language stated in Section 5 of the Act (§905 of Title 33 of the United States Code) that the liability of an employer, as prescribed in Section 4 of the Act, to wit, compensation, "shall be exclusive and in place of *all other liability of such employer to * * * anyone otherwise entitled to recover damages from such employer* at law or in admiralty on account of such injury" it would appear that a stevedore-employer should be entitled "to rest on the clear, unambiguous words of the statute" (*Baird* v. *John McShain, Inc.*, 108 F. Supp. 553).

The benefits which the Congress creates are often measured by the interpretation placed upon them by the judiciary. The benefits that the Congress has created under the Act in question are (1) a guaranteed compensation to an employee for every injury arising out of and in the course of employment, with fault or negligence playing no part, and (2) an absolute, certain, exclusive and circumscribed liability on the part of the employer. As Congressman Graham said in speaking on the floor of the House of Representatives in favor of the adoption of the Act (Con-

gressional Record, 69th Congress, Second Session, March 2, 1927, Vol. 68, p. 5411):

> "Hearings were granted, conferences were held and every endeavor made to secure a bill that would be beneficial to the workman and not oppressive to the employer and that would not be a destructive burden on industry; and I think we have accomplished that."

Manifestly, Congressional intent in part was that the Act should and would "not be oppressive to the employer" or a "destructive burden on industry."

And yet, if impleader by shipowners of stevedoring companies continues in actions wherein the stevedore's employees have sued the shipowner, which impleader is the highly fashionable trend and practice today in the various ports of the United States, the stevedore will be constantly forced to defend such actions even though he has complied with the provisions of the Act—this, in complete nullification of the clear and explicit language of the Congress that there shall be no other liability on the part of the stevedore to "anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury." To allow the continuance of the impleader of stevedores-employers is to sanction what actually amounts to law suits against them by their own employees —this, in contravention to the Act. The shipowner, the primary defendant and third party plaintiff, has become and will become a mere conduit[5] through whom the injured

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5 Indeed, the United States Court of Appeals, Third Circuit, in *Baccale v. Halcyon Lines*, 187 F. 2d 403, reversed *sub nom. Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, 72 S. Ct. 277, in holding that the employer was liable to the shipowner for what the employer would have been liable for in compensation under the Act, said (p. 406):

> "Nevertheless, the device of the Act must be frustrated if the negligent employer is subject to *full contribution. For then the third party is merely*

employee-longshoreman recovers from his stevedore-employer. The result destroys the basic principle of compensation. (See, *Johnson* v. *United States*, 79 F. Supp. 448; dissent of Crane, *Ch.J.*, in *Westchester L. Co.* v. *Westchester C. S. E. Corp.*, 278 N. Y. 175, 180).

If the scheme of things is to change, then Congress should legislate further to modify its explicit language.[6]

POINT II

In maritime non-collision tort actions, contribution and indemnity have merely in the past connoted a difference in the *quantum* of recovery. If legislation is necessary in order for admiralty to have a substantive rule of contribution between joint tortfeasors, then legislation should also be necessary to fashion a rule of indemnity in this type of case in the absence of an express contractual provision for indemnity.

Research has disclosed no case where this Court has held that there can be indemnity, as implied in the maritime law, in a personal injury case, *i.e.*, non-collision, where the putative indemnitee has been held liable to the putative indemnitor's employee.

Indemnity has been characterized as "an extreme form of contribution" (*Slattery* v. *Marra Bros.*, 186 F. 2d 134,

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the conduit between employer and employee for the transfer of damages in excess of compensation." (Italics supplied.)

6 The petitioner appreciates that the meaning to be accorded §905 of 33 U. S. C. A. (Section 5 of the Act) depends wholly upon the language employed by, and the intention of, the Congress. However, to round out the reservoir of law on this subject, the petitioner has annexed hereto an Appendix which shows that, out of 14 states which have passed on the "exclusive" liability feature of their respective compensation statutes, 9 states have held the same to be a bar to a claim of indemnity and 5 states have not.

138), and as *full contribution* (*Baccile* v. *Halcyon Lines*, 187 F. 2d 403, 406; reversed on other grounds *sub nom. Halcyon Lines* v. *Haenn Ship Ceiling*, 342 U. S. 282).

Similarly contribution has been characterized as "partial indemnity." *Erie R. Co.* v. *Erie & W. Transp. Co.*, 204 U. S. 220.

Preliminarily it would therefore appear that there is no difference in theory between contribution and indemnity and that such terms connote a difference in the *quantum* of recovery, *i.e.*, a total shifting of the economic loss or a percentage distribution.[7]

If there is no difference in theory between contribution and indemnity, then the result arrived at by this Court in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, is the touchstone in this matter. If it requires legislation to allow a substantive right of contribution in non-collision maritime tort actions, then it should follow that the same relief would be necessary in order to read into the maritime law a substantive right to recover the fullest contribution possible, *viz.*, indemnity.

That legislative action is necessary in a situation of this kind is further seen from an appreciation of two principles of law.

First, indemnity, implied in the *common* law, is a quasi-contractual right (Woodward, *Law of Quasi-Contracts*, sec. 259; *Contribution and Indemnity between Tort-feasors*, Robert A. Leflar, 81 Pa. Law Review 130, pp. 146-147; 42 *C. J. S. Indemnity* §§20-25; *Schwartz* v. *Merola Bros. Construction Corp.*, 263 App. Div. 631, 637, aff'd 290 N. Y. 145).

If this quasi-contractual right were sought to be enforced in admiralty, it would appear that admiralty would have

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[7] Prosser, *Torts*, p. 1117 (1941 ed.).

no jurisdiction over such a claim. *Robinson on Admiralty*, page 197 *et seq.* (1939 ed.).

How can it then be said that indemnity exists as a substantive right in the maritime law under the circumstances here present if there would be no jurisdiction to enforce that right within the very framework of the body of law in which the right is supposed to exist.

The second principle of law making legislative action necessary in connection with a right of indemnity in favor of a shipowner against a stevedore-employer is this.

A stevedore-employer upon his compliance with the U.S. Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §901 *et seq.*, cannot be subject to a tort claim by his own employee. 33 U.S.C.A. §905.

Thus, the fundamental requisite for a claim of indemnity to exist, as stated by the *Restatement of Restitution* §86, is missing. In the cited section of the Restatement it is said that

> "A person who has discharged *a tort claim to which he and another were subject* is entitled to indemnity or contribution from the other in accordance with the rules stated in §§76-85, except to the extent that the character of his conduct precludes restitution." (Italics supplied.)

Indeed, Judge L. Hand in *Slattery* v. *Marra Bros.*, 186 F. 2d 134 (C.A. 2), said (p. 139):

> "We cannot, however, agree that that result (indemnity) is rationally possible *except upon the assumption that both parties are liable to the same person for the joint wrong.*
>
> . . . . . .

"So far as we can see therefore there is nobody of sure authority for saying that differences in the degrees of fault between two tortfeasors *will without more strip one of them, if he is an employer, of the protection of a compensation act; and we are at a loss to see any tenable principle which can support such a result.*" (Italics supplied.)

This very same approach was used by the United States Court of Appeals, Second Circuit, in *Spaulding* v. *Parry Nav. Co.*, 187 F. 2d 257. In the cited case indemnity or contribution was denied since the third party defendant was not liable on the facts to the plaintiff there. Without such a finding, there could be no right of indemnity or contribution. Again, we have the principle that the third party defendant must be subject or liable to a tort claim by the plaintiff in order for a defendant to obtain indemnity.

No matter which way one turns, one returns to the place of beginning. The Act here involved by its express language grants immunity to the stevedore-employer from any claim over, whether for contribution or indemnity. Further, the rationalization behind the indemnity concept fails where a third party, sued by a stevedore's employer, seeks a right over against the stevedore-employer.

Resort to legislative action would enable all interests to be represented at hearings or inquiries so that all interests could explore the application of a rule granting indemnity in connection with §905 of the Act (cf. *Halcyon Lines* v. *Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282, 286, 72 S. Ct. 277, 280.

If no right of indemnity exists under the maritime law in a case of the type here involved, the ensuing discussion that the Trial Court's findings and inferences are supported by the evidence and permitted, if not compelled,

a dismissal of the third party complaint becomes academic. However, to round out the full reservoir of decisional law, petitioner develops under Point III the evidence which fully supports the findings and inferences of the Trial Court.

POINT III

The Trial Court's findings and inferences respecting causation are fully supported by the evidence. The United States Court of Appeals was in error in arriving at a different finding of causation and the quality thereof.

If indemnity exists in the maritime law in favor of a shipowner against the employer of an injured maritime worker in a personal injury action, then admiralty has adopted, although never so held by this Court, that there are different degrees of fault or negligence between tortfeasors which different degrees of negligence constitute tortfeasors either "active" or "passive."

Whether a party is "actively" or "passively" negligent is ordinarily a question of fact for a jury's determination. *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314, 328.

If Pan-Atlantic and Ryan had not stipulated that all questions of fact and law were to be tried and to be determined exclusively by the Trial Court, without benefit of a jury, then in the normal course of procedure the entire case would have gone to the jury for determination in contrast to merely Palazzolo's right of recovery against Pan-Atlantic. Had the jury decided, as the Trial Court actually did in this case, that Pan-Atlantic and Ryan were joint tortfeasors and that Pan-Atlantic was not entitled to recover indemnity from Ryan, we think it could not be gainsaid that the Court below would have been limited on its review to determining whether there was evidence to sup-

port the finding of the jury. Where the Trial Court has become, pursuant to the stipulation of Pan-Atlantic and Ryan, the trier of the facts respecting the right of indemnity, does not the same rule or yardstick apply respecting the scope or limit of review by the Court below?

As we read the recent decision of this Court in *McAllister* v. *United States* (Nov. 8, 1954), not officially reported, unofficially reported in 75 S. Ct. 6, the answer to the foregoing question is in the affirmative. Now let's see what the Trial Court did and what it found in the record.

Manifestly, in order to have arrived at the conclusion it did the Trial Court must have inherently found that the negligence of Pan-Atlantic and Ryan jointly caused or contributed to the happening of the accident. Such a question of causation is a question of fact. *F. E. Grauwiller Transportation Co., Inc.* v. *Gallagher Sand & Gravel Corporation*, 153 F. 2d 384, 385.

In denying a right of indemnity and in dismissing the third party complaint, the Trial Court obviously found Pan-Atlantic guilty of "active" negligence. That Pan-Atlantic affirmatively and actively participated in the tort will be seen hereinafter.

The plaintiff's witnesses testified to a man that there were no chocks of any kind and that the rolls of paper pulp were secured by pieces of dunnage, described on occasion as "scrap" dunnage or firewood (R. 66, 68-69, 86, 94-95, 126, 275-276). According to some of the plaintiff's fellow employees wedges were not supplied and used by the ship because Pan-Atlantic didn't believe in wedges (R. 127, 285).

Pan-Atlantic's cargo mate, Don Fisher, testified that chocks and dunnage are ship's equipment (R. 256) and that they were available on the ship and on the dock at Georgetown (R. 236). Indeed, Fisher testified that he saw chocks being used at the loading port (R. 236) and that

at the very time of the accident to Palazzolo at the discharging port and at the very bottom tiers which are involved in Palazzolo's accident he had seen chocks (R. 243).

There was thus presented to the jury a sharp issue of fact which the jury resolved in the plaintiff's favor. Inherent in its verdict is the finding that Pan-Atlantic did not supply any chocks but only supplied makeshifts such as dunnage or firewood which were inadequate to prevent the roll from "jumping" and injuring the plaintiff.

Further, the uncontradicted testimony of Pan-Atlantic's Captain Fisher shows his complete knowledge of the loading and unloading operation and his control over the same (R. 214, 243, 251). He would check to see that Ryan was loading the cargo properly and *chocking* it (R. 234). It was his job to see that what was done by Ryan was done properly (R. 234). Similarly Captain Fisher was in hold No. 3, where Palazzolo was hurt at the time of the accident and from 5 to 10 minutes prior thereto (R. 238). His purpose in being there according to his own testimony was, among other things to check "*any unsafe method or practice*" (R. 260). He was satisfied that Ryan had loaded No. 3 properly (R. 260).

Upon this testimony, the Trial Court concluded (R. 317):

> "In my judgment there is sufficient evidence in this record to justify a finding of negligence on the part of Pan-Atlantic by the jury, and *also*, pursuant to the stipulation of the parties, *for the Court to make such*

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[8] See *Contribution and Indemnity* by Robert A. Leflar, 81 Pa. Law Rev. 130, 147, where the author correctly says:

> "But in tort indemnity cases, the leading facts are apt to be acts and relationships out of which tort liabilities have arisen, and it will often follow from this that the question of unjust enrichment involved in the granting of indemnity will have to be decided on substantially the same principles as those which controlled the creation of the original tort liability."

a finding with respect to the issues raised by the third party complaint." (Italics supplied.)

Pan-Atlantic has been held liable for its own *affirmative* negligence and *active* conduct in (a) supplying inadequate equipment and (b) allowing its vessel's cargo to be stowed with inadequate gear, which was observed by the mate whom it had placed in charge and who controlled and supervised all loading and discharging operations.

If the Trial Court had granted indemnity, as implied in law, in the face of the inherent findings of the jury and the evidence embraced in this record, it would have flown in the face of the Court's holding in *American Mut. Liability Ins. Co.* v. *Matthews*, 182 F. 2d 322, that (p. 324)

> "* * * no promise by the employer can be implied that he will not use equipment furnished him by the shipowner to be used for the very purpose to which it was put. Nor can a promise be implied that he will use care to detect any defect in the equipment which patently existed when the equipment was delivered for use by the employer. To imply such a promise would mean that the employer agreed to protect the shipowner against liability *arising out of the shipowner's own negligence*. In the absence of an *express* promise, such an implication would be utterly unreasonable." (Italics supplied.)

To the same effect, see the *Per Curiam* opinion of the Court denying the shipowner's petition for rehearing in *Mikkelsen* v. *The Granville*, 192 F. 2d 809, 810.

This is *not* a case where Pan-Atlantic has been held liable because any negligence of Ryan has been imputed to it. Pan-Atlantic has been held liable for an unseaworthy con-

dition due to improper gear *furnished by it* and used for the purpose intended—this, to the knowledge of Fisher, its cargo mate in charge and control of the loading and discharging operation. From Fisher's uncontradicted testimony we learn that his duties were many (R. 234) and included the checking of the cargo to see that it was loaded and chocked properly. Indeed, he stated that

> "The primary job, of course, was watching the cargo, this is in port, and to see that it is loaded and stowed properly for the safety of the vessel and the cargo and the crew that sails the vessel" (R. 234).

He then expanded his testimony to include in this category the safety of longshoremen who come on board to discharge the cargo (R. 251).

According to Fisher, Ryan's job at Georgetown was to load the vessel (R. 214)

> "to the general satisfaction of the mate in charge of the vessel, the master, and the chief officer and his under officers."

As far as Fisher was concerned it was his job to see that everything was done right and Ryan did do everything right as far as he was concerned in loading and discharging the vessel (R. 260). The very bottom tier, involved in this accident, was put in to his satisfaction (R. 259). If anything wrong had been done he would have complained to Ryan's pier superintendent but he made no complaints (R. 260) for the reason that he was completely satisfied. Had he seen anything improperly done he would have stopped it (R. 261).

From his own testimony he had the right and the duty to stop any improper operation and knock off the stevedores. If he did not do so, the most that Pan-Atlantic

can urge is a factual picture which shows that, *at best*, if at all, Ryan is pitched with the same tar.

Not only was everything done to the satisfaction of Fisher at the port of loading but everything was done properly at the port of discharge. He was in No. 3 hold where Palazzolo was injured at the time of the happening of the accident and had been there watching the operation for 5 to 10 minutes prior to the accident (R. 238).

Fisher was not down in No. 3 hold at the time of loading and discharging to take in the sights nor to welcome aboard passengers embarking on a Caribbean cruise. He was a *cargo* mate and in connection with the cargo he

> "was primarily concerned to check the damage or the pilferage or *any unsafe method or practice*" (R. 260).

In holding that Pan-Atlantic was a joint tortfeasor for its active participation in the tort, the Trial Court was compelled to say of the testimony that (R. 319)

> "it is plain that Pan-Atlantic's cargo officer did not properly perform his admitted duty to supervise the safe and careful loading of the vessel. * * * Captain. Fischer's (sic) own testimony shows his *complete knowledge* of the loading and unloading operation, the *opportunity and ability* on his part to discover the defect in stowage at either the loading or unloading port, and his *authority* to remedy the condition or halt the work." (Italics supplied.)

Omnipresent control by Pan-Atlantic through the activities of Fisher saturates this entire record. Its wrongful conduct has been found by the jury. *Sequitur* if Pan-Atlantic under any legal legerdemain has discharged a duty which as between itself and Ryan it was the latter's obligation to discharge, Pan-Atlantic as "the payor is barred

by the wrongful nature of his (its) conduct" from obtaining indemnity. *Restatement of Restitution*, §76. Even where indemnity is sought by one of two defendants held *directly liable to the plaintiff* (not present in the case at bar) indemnity could not be obtained where "after discovery of the danger, he (the indemnitee) acquiesced in the continuation of the condition." *Restatement of Restitution*, §95.

Those decisions of state and federal courts dealing with claims of indemnity have employed various phraseology in disposing of these claims. Disposition at times has revolved around "active and passive negligence," "active and passive cause," "primary and secondary negligence," "primary and secondary duty," "primary and secondary cause," "joint tort feasors" and "particeps criminis." Nomenclature has been imprecise at times.

However, one thread binds up all these decisions. The thread common to all or the principle by which contentions for indemnity are parsed is that one who has participated by active conduct in a tort can have no recovery over. *Union Stock Yards Company* v. *Chicago B. & Q. R. Co.*, 196 U. S. 217, 25 S. Ct. 226; *Mikkelsen* v. *The Granville*, 192 F. 2d 809; see excellent discussion in *Falk* v. *Crystal Hall, Inc.*, 200 Misc. 979, aff'd 279 App. Div. 1071; *Phoenix Bridge Co.* v. *Creem*, 102 App. Div. 354, 356, aff'd 185 N. Y. 580; *Edwards* v. *Sophkirsh Holding Corp.*, 280 App. Div. 168, aff'd 304 N. Y. 850; *Adler* v. *Tully & Di-Napoli, Inc.*, 274 App. Div. 1001, aff'd 300 N. Y. 662; *Dolnick* v. *Edward Donner Lumber Corp.*, 275 App. Div. 954, aff'd 300 N. Y. 660.

Since it is fundamental learning that indemnity, as implied by the common law in certain circumstances, is an equitable doctrine and that the delinquencies of the parties are to be weighed on the basis of the ethical quality of their tortious acts, it was, it is respectfully sub-

mitted, gross inequity for the Court below to have reversed the Trial Court and to have granted indemnity in favor of Pan-Atlantic (assuming *arguendo* that indemnity exists in the maritime law in a personal injury action) where Pan-Atlantic, the putative indemnitee, had been found by the jury by virtue of its general verdict to have *furnished* improper gear and to have been in complete control of the operation of loading and discharging the vessel.

If indemnity exists under the maritime law where the parties are aligned as they are in the instant matter then to allow a recovery over by Pan-Atlantic against the petitioner herein would also place a premium on inaction (*Falk* v. *Crystal Hall*, 200 Misc. 979, 985, aff'd 279 App. Div. 1071) and allow a shipowner to point his finger at a stevedoring firm and say

> "I am furnishing you with defective equipment but I have a right over against you in the event that one of your employees is injured thereby. I also observe your loading and discharging operations and they are all right with me now but if a court or jury should hereafter hold that I guessed wrong then the court will allow me to get indemnity from you although at this time I am folding my arms and telling you that you are properly performing your stevedoring services."

It is urged by Ryan that the record amply supports the determination and findings of the Trial Court and the United States Court of Appeals was in error in reversing the judgment of the Trial Court which dismissed the third party complaint. What this Court said in *McAllister* v. *United States*, 75 S. Ct. 6, is completely apposite to the case at bar (p. 9):

> "Certainly we cannot say on review that a judgment based upon such evidence is clearly erroneous."

CONCLUSION

The judgment in the Court below should be reversed and that entered in the United States District Court should be reinstated with costs to the petitioner in this and all other Courts being granted.

Respectfully submitted,

SIDNEY A. SCHWARTZ
EDWARD ASH
Counsel for Petitioner

The following decisions of the state or federal courts have held compliance with the Compensation Act of the particular state involved to be a bar to a claim of indemnity implied in law.

Colorado: In *Ward* v. *Denver & R. G. W. R. Co.*, 119 F. Supp. 112, it was held that the payment of compensation by the employer was a bar to the bringing of a third-party action against him for indemnification. Section 292 of Chapter 97 of the Colorado Statutes Annotated provides as follows:

> "Any employer who has elected to and has complied with the provisions of this article, including the provisions relating to insurance, shall not be subject to the provisions of the last preceding section; nor shall such employer be subject to any other liability whatsoever for the death of or personal injury to any employee, except as in this article provided; and all causes of action, actions at law, suits in equity, and proceeding whatever, and all statutory and common law rights and remedies for and on account of such death, or personal injury to any such employee and accruing to any and all persons whomsoever, are hereby abolished except as in this article provided."

Maryland: In *Baltimore Transit Co.* v. *State to Use of Schreifer*, 183 Md. 674, cited as declaratory of Maryland law in *Clarke* v. *U. S.*, 115 F. Supp. 14, it was held that an employer who complies with the compensation act may not be impleaded in an action brought by the employee against a third-party. The annotated code of Maryland does not contain any provision discussing the exclusive liability of the employer.

New Jersey: In *Slattery* v. *Marra Bros. Inc.*, 186 F. 2d 134, it was held that compliance with the compensation statute was a valid defense. Section 34:15-8 of the New Jersey Statutes Annotated provides as follows:

> "Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof that has provided in this article and an acceptance of all the provisions of this article, and shall bind the employee himself and for compensation for his death shall bind his personal representative, his widow and next of kin, as well as the employee, and those conducting his business during bankruptcy or insolvency."

North Carolina: Held to be a bar in the cases of *Lovette* v. *Lloyd*, 236 No. Carolina 663; *Brown* v. *Southern Railway*, 202 No. Carolina 256; *Essick* v. *City of Lexington*, 232 No. Carolina 200; *Hoover* v. *Globe Indemnity Co.*, 202 No. Carolina 655; and *Hunsucker* v. *High Point Bending and Chair Co.*, 237 No. Carolina 559. Section 97-10 of the General Statutes of North Carolina provides as follows:

> "The rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this article, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, its personal representative, parents, dependents or next of kin, as against his employer at common law, or otherwise, on account of such injury, loss of service, or death: * * *"

Ohio: Held to be a bar in *Bankers Indemnity Insurance Co.* v. *Cleveland Hardware & Forging Co.*, 77 Ohio App.

121. Section 1465-70 of Pages Ohio General Code provides as follows:

> "Employers who comply with the provisions of section 1465-69 shall not be liable to respond in damages at common law or by statute, for any injury disease or bodily condition, whether such injury, disease or bodily condition is compensable under this act or not, or for any death resulting from such injury, disease or bodily condition, of any employee, wherever occurring, during the period covered by such premium so paid into the State Insurance Fund, or during the interval of time in which such employer is permitted to pay such compensation direct to his insured or the dependents of his killed employees as herein provided."

Oklahoma: Held to be a bar in *Peak Drilling Co. v. Halliburton Oil Well Cement Co.*, 215 F. 2d 368. Section 12 of Title 85 of Oklahoma Statutes Annotated provides as follows:

> "The liability prescribed in the last preceding section shall be exclusive and in place of all other liability of the employer and any of his employees, at common law or otherwise, for such injuries, loss of services or death, to the employee, spouse, personal representative, parents, dependents, or any other person * * *"

Pennsylvania: Held to be a limited bar in *Maio* v. *Fahs*, 339 Pa. 180. The Pennsylvania Workman's Compensation Act as found in Title 77 of Purdon's Pennsylvania Statutes Annotated does not contain an exclusive liability section.

South Carolina: In *Burns* v. *Carolina Power & Light Co.*, 88 F. Supp. 769, aff'd 193 F. 2d 525, the Court declared that

if they had to decide this point they would find it to be a bar. Section 72-401 of the Code of Laws of South Carolina, 1952, provides as follows:

> "Every employer who accepts the compensation provision of this Title shall secure the payment of compensation to his employee in the manner provided in this Chapter. While such security remains in force he or those conducting his business shall only be liable to any employee who elects to come under this Title for personal injury or death by accident to the extent and in the manner specified in this Title."

Wisconsin: Held to be a bar in *Buggs* v. *Wolff*, 201 Wisc. 533 and *Guse* v. *A. O. Smith Corp.*, 260 Wisc. 403.

The following decisions of the state or federal courts have held compliance with the compensation act of the particular state involved not to be a bar to a claim of indemnity implied in law:

California: In *Baugh* v. *Rogers*, 24 Calif. 2d 200, it was held that the payment of compensation by the employer is no defense to an action for indemnification against the said employer by a third-party. Section 3601 of the Labor Code of California provides as follows:

> "Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is, except as provided in Section 3706, the exclusive remedy against the employer for the injury or death."

Iowa: Held no bar to indemnification from the employer in *American District Telegraph Co.* v. *Kittleson*, 179 F. 2d

946. Section 85.20 of the Iowa Code Annotated provides as follows:

> "The rights and remedies provided in this Chapter for an employee on account of injury shall be exclusive of all other rights and remedies of such employee, his personal or legal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury * * *"

Minnesota: Held to be no bar in *Lunderberg* v. *Bierman*, 63 N. W. 2d 355 (1954), not officially reported as yet. In Section 176.031 of Minnesota Statutes Annotated it is provided as follows:

> "The liability of an employer prescribed by this Chapter is exclusive and in the place of any other liability to such employe, his personal representative, surviving spouse, parent, any child, dependent, next of kin, or other person entitled to recover damages on account of such injury or death."

New York: Held not to be a bar to indemnification from the employer in *Westchester Lighting Co.* v. *Westchester County Small Estates Corp.*, 278 N. Y. 175. Section 11 of the New York Workmen's Compensation Law provides as follows:

> "The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death, except that if an employer fail to secure the payment of compensation for his injured

employees and their dependents as provided in section fifty of this chapter, an injured employee, or his legal representative in case death results from the injury, may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury; and in such an action it shall not be necessary to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

Rhode Island: Held not to be a bar to indemnification from the employer in *Whitmarsh* v. *Durastone Co.*, 122 F. Supp. 806. Chapter 300 Article I Section 6 of the Rhode Island General Laws provides as follows:

"The right to compensation for an injury, and the remedy therefor granted by this chapter, shall be in lieu of all rights and remedies as to such injury now existing, either at common law or otherwise; and such rights and remedies shall not accrue to employees entitled to compensation under this chapter while it is in effect."

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IN THE

Supreme Court of the United States

OCTOBER TERM—1954

No. 157

RYAN STEVEDORING CO., INC.,

Petitioner,

—v.—

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

PETITIONER'S OBJECTIONS TO MOTION OF AMERICAN MERCHANT MARINE INSTITUTE, INC., FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

SIDNEY A. SCHWARTZ
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76 Beaver Street
New York 5, New York

IN THE

Supreme Court of the United States

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RYAN STEVEDORING CO., INC.,

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PETITIONER'S OBJECTIONS TO MOTION OF AMERICAN MERCHANT MARINE INSTITUTE, INC., FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Ryan Stevedoring Co., Inc., respectfully objects to the motion of the American Merchant Marine Institute, Inc., for leave to file a brief as *amicus curiae* in the above entitled matter. Petitioner has withheld its consent to the filing of such brief for the reasons hereinafter stated.

When the petitioner filed its petition and brief for a writ of certiorari to issue out of this Court, directed to the United States Court of Appeals for the Second Circuit, the National Association of Stevedores applied to this Court for leave to file a brief *amicus* in support of certiorari being granted. The respondent herein opposed said application of said Association. At pages 2 and 3 of its brief in oppo-

sition to the motion of said stevedoring association the respondent set forth the substance of a letter it had written to counsel for said proposed *amicus* on August 4, 1954. For ready reference we here set forth what the respondent shipowner stated as its reason for opposing the stevedoring association's filing a brief as *amicus*.

> "You will see therefrom we have taken the position that the *facts are peculiar* and are not in any way typical of the ordinary relationship between shipowner and stevedore. We call your attention to the fact that the parties here are wholly-owned subsidiaries of a common parent and the contractual arrangements between them were informal and unusual.
>
> If we felt that there was something in the pending case which might classify it as a 'test' case, we would be very pleased to have briefs filed by anyone interested in the subject. *We feel that this is a private fight having no effect, directly or indirectly, upon anyone other than the Underwriters for the parties concerned,* and therefore we regret that we are not able to consent to your filing a brief." (Italics supplied.) (Pages 2 and 3 of respondent's brief in opposition to motion of the National Association of Stevedores to file a brief *amicus*.)

By order of this Court the application of the National Association of Stevedores to file a brief *amicus* was denied on October 14, 1954.

Now comes the American Merchant Marine Institute, Inc., and in its application for leave to file a brief *amicus* it seeks to show the importance of the subject before this Court. However, it in no way complies with Rule 42 (3) of the Rules of this Court. It does not show that the respondent, on whose side it seeks to align itself, has not raised

all the questions of fact or law which are projected by this case. Indeed, it has not shown that the respondent has not adequately presented the facts or the questions of law inherent in this case.

Further, inherent in the application of the American Merchant Marine Institute, Inc., would appear to be an undertone that what it seeks to set forth as broad propositions of law "by way of supplementing" the respondent's argument is known to only an enlightened few. Actually, an analysis of the brief, sought to be filed by this applicant, shows an identical argument under Points I and III of its brief as is contained in Point I of respondent's brief. Similarly, Point II of the applicant's brief is identical in approach with Point II of respondent's brief. The very same decisions are discussed in the respondent's brief as are set forth in the applicant's brief.

The similarity (if not identity) of argument and approach between applicant's brief and that of respondent indicates quite clearly that the applicant merely echoes the respondent's arguments. Petitioner assumes that the weight of numbers on one side of any proposition adds nothing to the disposition that should be made of any given proposition of law.

The fallacy of the applicant's approach to the factual problem which has been presented to this Court by petitioner and respondent is best seen in the applicant's statement, which we assume was inadvertent, that "it be permitted to discuss in a brief those fundamental principles of law which govern the right of one liable *without fault* to recover indemnity * * *" (Italics supplied.)

The applicant has lost sight completely of the Trial Court's opinion in which the *fault* of the respondent was clearly outlined as follows (R. 316; 317):

"In accordance with the allegations of plaintiff's complaint, and in line with the theory upon which the case was tried, the jury was charged as to unseaworthiness and negligence.

* * * * *

"In my judgment there is sufficient evidence in this record to justify a finding of negligence on the part of Pan-Atlantic by the jury, and also, pursuant to the stipulation of the parties, for the Court to make such a finding with respect to the issues raised by the third party complaint."

In affirming the injured longshoreman's recovery against the respondent herein, the Court of Appeals, 2nd Circuit, again found the *fault* of the respondent in this record. It said (R. 326):

"There was ample evidence to support a jury verdict on either or both negligence or unseaworthiness."

If this proposed *amicus* seeks to discuss "fundamental principles of law which govern the right of one liable without fault to recover indemnity from another" then the above entitled action in which the respondent has been found at *fault* by all Courts is not the one in which this proposed *amicus* should seek intervention.

Since it is palpably clear that the motion and brief of the American Merchant Marine Institute, Inc., as *amicus*, is nothing more than a "ditto" mark of the respondent's brief, the petitioner's objection to the instant motion should be sustained and the motion denied, to which end the petitioner's objections are

Respectfully submitted,

SIDNEY A. SCHWARTZ,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1954

No. ~~557~~ 4

RYAN STEVEDORING CO., INC.,

Petitioner,

—v.—

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

PETITIONER'S OBJECTIONS TO MOTION OF ASSOCIATION OF AMERICAN SHIP OWNERS TO FILE BRIEF AS *AMICUS CURIAE*

SIDNEY A. SCHWARTZ
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IN THE

Supreme Court of the United States

OCTOBER TERM—1954

No. 157

RYAN STEVEDORING CO., INC.,

Petitioner,

—v.—

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

PETITIONER'S OBJECTIONS TO MOTION OF ASSOCIATION OF AMERICAN SHIP OWNERS TO FILE BRIEF AS *AMICUS CURIAE*

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Ryan Stevedoring Co., Inc., respectfully objects to the motion of the Association of American Ship Owners for leave to file a brief as *amicus curiae* in the above entitled matter. Petitioner has withheld its consent to the filing of such brief for the reasons hereinafter stated.

The Association of American Ship Owners does not even make a pretense to comply with Rule 42 (3) of this Court to show facts or questions of law that have not been or will not be adequately presented by the parties to this matter.

The motion of the aforesaid Association is dictated seemingly by a desire to show by weight of numbers of *amici* (there also has been presented to this Court the motion of the American Merchant Marine Institute, Inc., for leave to

file a brief *amicus*) that the contentions of the shipowner-respondent are correct. Indeed, nowhere in the motion is it stated that the respondent herein has not or will not adequately present the facts and questions of law that are involved in this matter.

The sole and expressed purpose of the motion of this Association is that this Court will know of the "carrier's wishes" (see p. 2 of the motion of said Association). The Association has misconceived, petitioner respectfully submits, what this Court said in *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282, with respect to a presentation of the carrier's wishes. In the cited case this Court, as petitioner reads the decision, indicated that the best forum to present the views of the various diverse interests in the type of subject here involved was the legislative forum where

> "legislative consideration of action can best bring about a fair accommodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run."

In view of the complete failure of the motion of the Association of American Ship Owners to comply with the requirements of Rule 42 (3) of this Court, the motion of said Association to file a brief *amicus* should be denied and it is to that end that the petitioner's objections, set forth herein, are

Respectfully submitted,

SIDNEY A. SCHWARTZ
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IN THE

Supreme Court of the United States

OCTOBER TERM—1954

No. 157

RYAN STEVEDORING CO., INC.,

Petitioner,

—v.—

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER TO THAT OF PAN-ATLANTIC STEAMSHIP CORPORATION

SIDNEY A. SCHWARTZ
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IN THE

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PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER TO THAT OF PAN-ATLANTIC STEAMSHIP CORPORATION

Replying to Point I

The respondent has not shown at any place in Point I of its brief that the legislative history is on the side of the respondent's argument respecting the statute here involved. In that posture of there being no aids to legislative intent, petitioner respectfully submits that it is entitled under the authorities set forth in its main brief, Point I thereof, "to rest on the clear, unambiguous words of the statute" (*Baird* v. *John McShain Inc.*, 108 F. Supp. 553) which have been indicated to be compelling guides to legislative intention (*United States* v. *American Trucking Associations*, 310 U. S. 534, 543, n. 18; *Schwegmann Bros.* v. *Calvert Distillers*, 341 U. S. 384, 390-395).

However, the respondent attempts to argue now that this is a breach of contract case instead of a tort case. To arrive at that result the respondent attempts to differ-

entiate between quasi-contract, implied contract and tort. Completely lost sight of by the respondent is that the alleged breach of contract is bottomed upon a tort (negligence in the performance of the contract) and that the remedy of indemnity in such a situation is a quasi-contractual remedy. These terms, viz., quasi-contractual and implied contract, are synonymous. No matter how the remedy may be characterized, it is granted on tort principles which in turn are controlled by the quality of the negligence of the party claiming indemnity and the party claimed against.

Indeed, if what the parties have alleged in pleadings is determinative of what theory is invoked, the respondent predicated its claim not on a contract proposition but on a tort proposition. For, the third party complaint of the respondent against the petitioner is bottomed *solely* in negligence. Thus, the pertinent allegations of the third party complaint read as follows (R. 12, 13):

> "* * * If the rolls of pulp were loaded improperly or in a negligent manner without being properly tiered, piled and secured, and if the SS Canton Victory at the times mentioned in the complaint was thus rendered unseaworthy, such unseaworthiness was caused and created solely through the conduct, negligence, carelessness and recklessness of the third-party defendant, Ryan Stevedoring Co. Inc., its agents, servants and/or employees in the manner in which they performed the aforesaid work and in their failure to make proper preparation and to take proper precautions in the carrying out of the aforesaid work."
>
> * * * * *
>
> "Thirteenth: That if the plaintiff is successful in this action the third-party plaintiff, Pan-Atlantic

Steamship Corporation, will be damaged in the sum of money recovered by the plaintiff.

Fourteenth: The third-party plaintiff, Pan-Atlantic Steamship Corporation, will be so damaged by reason of the aforesaid conduct, negligence, carelessness and recklessness of the third-party defendant, Ryan Stevedoring Co. Inc."

What the respondent is seeking to do obliquely by the distorted argument that is now made under Point I of its brief is to have this Court believe that there is an express contract of indemnity *which does not exist in the instant matter at all.*

The development of the argument under Point I of respondent's brief is an attempt to draw this Court's attention away from the tortious conduct of the respondent which has been found by the jury in its verdict, which has been found by the Trial Court in its opinion herein (R. 316, 317) and by the U. S. Court of Appeals in its opinion (R. 326).

The respondent would have this Court believe that because of there having been a contractual relationship between the respondent and the petitioner a rule of indemnity, whether characterized as quasi-contract or implied contract, exists different from that which is applied where the putative indemnitor and indemnitee are strangers to one another.

Thus, the respondent makes the bald statement at page 19 of its brief in dealing with five decisions therein cited that they are largely unimportant *here* because of the contract features found by the Court of Appeals. Indeed, in four of the five cases (the only exception being *Slattery* v. *Marra Bros., Inc.*, 186 F. 2d 134) the putative indemnitor and indemnitee *were in a contractual relation* to one another. *Despite* that the Court of Appeals for the Second

Circuit did not in these *contractual*, so called, cases grant indemnity because of the reasons therein stated, all of which reasons apply to the case at bar.

The respondent at pages 12 and 13, in answer to the petitioner's argument as to what compensation carriers would have to do in other matters, if the decision of the U. S. Court of Appeals in the instant matter were affirmed, states that the course of anticipated conduct which the petitioner indicated would have to be resorted to would be "violation of the law" and "fraudulent." The respondent has lost sight of the fact that under the New York Workmen's Compensation Act, upon which the Federal Statute here involved is modeled, the compensation carrier when it obtains title to the third-party action by operation of law (here by 33 U. S. C. A. §933 [b]) has the right to conduct any litigation that it sees fit but

> "is under no duty to prosecute against the third party * * *."

Skakandy v. *State of New York*, 274 App. Div. 153, affirmed 298 N. Y. 886. To the same effect see *Corsi* v. *Jenkins*, unofficially reported, 66 N. Y. S. 2d 98, not officially reported.

The respondent tucks away in footnote 2, page 13 of its brief, an oblique reference to a constitutional problem respecting a divestiture of property rights if the Statute were construed as contended for by the petitioner.

In *United States* v. *Nebo Oil Co.*, 190 F. 2d 1003, the Court in its discussion of divestiture of property and due process distinguished between *vested* and *inchoate* rights as follows (p. 1008):

> "True, there is no rule or principle known to our system of the law whereby private property can be taken from one person and conveyed to another for his private use and benefit. It is equally true

that remedial legislation frequently has an effect upon the control and disposition of property. The principal restriction upon legislation of this nature appears to be that vested rights must not be disturbed. *But many rights, privileges and immunities having to do with ownership under a specific state of the law, cannot be regarded as vested rights. To be a vested right it must have become a title, legal or equitable, to the present or future use and enjoyment of property.* Cooley's Constitutional Limitations (8 ed.), Vol. 2, Chapter XI; see Pennie v. Reis, 132 U. S. 464, 10 S. Ct. 149, 33 L. Ed. 426; Pearsall v. Great Northern Railway Company, 161 U. S. 646, 16 S. Ct. 705, 40 L. Ed. 838. *It cannot be considered a vested right if it is nothing more than a mere expectation, or hope, based upon an anticipated continuance of the applicable general laws.*" (Italics supplied.)

That no one has a vested right in the law has been often stated by this Court. *Silver* v. *Silver*, 280 U. S. 117, 50 S. Ct. 57; *Wilmington Star Mining Co.* v. *Fulton*, 205 U. S. 60, 27 S. Ct. 412.

In the instant matter there is no contractual right between the respondent and petitioner which is vested and which would be divested if the Statute were construed as the petitioner herein contends. See *United States Light & Heat Corp.* v. *Niagara Falls G. & E. L. Co.*, 47 F. 2d 567.

In dealing with this very Statute the District Court in *Coates* v. *Potomac Electric Power Co.*, 95 F. Supp. 779, held that the right to contribution was not a *vested* right which the instant Statute might not abrogate.

Manifestly, the so called contractual rights or arrangement between the respondent and petitioner arose many years after the enactment of the Statute involved and

therefore the respondent had no rights which had become vested as of the enactment of this Statute. *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 37 S. Ct. 260.

Scapitur: the respondent has shown nothing in its Point I which destroys or even mitigates petitioner's argument under Point I of the latter's brief.

Replying to Point II

That this is a maritime tort non-collision matter admits of no dispute, the respondent's argument to the contrary notwithstanding. *Halcyon Lines* v. *Haenn Ship Ceiling Co.*, 342 U. S. 282; *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406.

This Court in the *Halcyon* case indicated quite clearly that generally[1] courts exercising a common law jurisdiction have held that they cannot create a right of contribution between joint tort feasors. It was felt that such a right in the maritime law would be created if this Court were convinced

> "that it would best serve the ends of justice."

Since indemnity is nothing more than "full"[2] or "extreme"[3] contribution, the result arrived at by this Court in the *Halcyon* case should apply.

This would afford insurers, shipowners, stevedores and even unions, representing the longshoremen of our nation, to present their views to appropriate committees of the Congress.

---

1 Research discloses that Pennsylvania, Minnesota and Wisconsin have by decisional law created a right of contribution between joint tort feasors.

2 *Bacile* v. *Halcyon Lines*, 187 F. 2d 403, 406, rev'd *sub nom. Halcyon Lines* v. *Haenn*, 342 U. S. 282.

3 *Slattery* v. *Marra Bros.*, 186 F. 2d 134.

Replying to Point III

Again endeavoring to color all argument with the untenable hue of a contract case (without frankly stating to the Court that the breach of a contract to perform services is bottomed in negligent performance which creates under the common law a cause of action for indemnity implied in law in the absence of a contractual provision for indemnity *and* in the absence of active and affirmative negligence of the putative indemnitee)[4] the respondent studiously avoids discussion of the *uncontradicted* testimony, which completely supports the Trial Judge's findings that (R. 316-319):

(1) the injured longshoreman tried his action against the respondent on the theory of negligence and unseaworthiness;

(2) the injured longshoreman alleged in his complaint (R. 8) that the respondent caused the rolls of pulp to be loaded in a careless manner;

(3) the evidence from the mouth of the respondent's own cargo mate was that he was in complete control of the loading and unloading operation, that his job was to see that the cargo was *chocked* properly, and that if he saw anything wrong he would have taken steps to stop the work.

Indeed, the very bottom tier, involved in this accident, was put in to his satisfaction (R. 259).

---

[4] Indeed, one of the authorities relied upon by respondent, *McFall v. Compagnie Maritime Belge*, 304 N. Y. 314, sets forth in clear language petitioner's contention that in so-called "contract" cases, *i.e.*, no express contract of indemnity but a contractual relation between putative indemnitor and putative indemnitee, a cause of action for indemnity is based on tort principles and the quality of the negligence of the parties, *i.e.*, active or passive, determines the granting or withholding of indemnity.

Respondent at page 33 of its brief states that the Court of Appeals placed the ultimate responsibility on the stevedore, "who is best situated as a *matter of fact* to remedy the conditions which caused Palazzolo's injury." (Italics supplied.)

Completely silent is the respondent respecting the fact that the cargo mate testified as follows (R. 238):

> "Q. Now, you were down in No. 3 at the time he was hurt, weren't you, Captain Fisher? A. Yes, sir.
>
> Q. About what hour do you fix the time of the event? A. It was 4 P. M.
>
> Q. About 4 P. M.? A. Yes, sir.
>
> Q. How long had you been down there, according to your present recollection, before Mr. Palazzolo was injured? A. That is hard to say; I think maybe five minutes, it could have been ten minutes."

Since the jury believed the longshoreman's witnesses that wedges were never supplied by the respondent because it didn't believe in wedges (R. 127, 285) and that only makeshifts had been supplied by respondent to chock this cargo of rolls of pulp, how can the respondent in good conscience put the total loss on petitioner where it has been found as a fact:

(1) that respondent *furnished* defective appliances and

(2) that the cargo mate who was right at the very spot had ample opportunity under his own testimony not only to discover the conditions which were *open* and *entirely visible* but who, unless he was totally blind or unconcerned with the conditions, had actual knowledge thereof.

The trial Court's determination that respondent and petitioner were *joint tort feasors* (connoting the active participation of the respondent in the negligence complained of and said active participation causing the accident) is completely supported by the evidence.

However much the respondent attempts to slough off "inference, causation and the quality of tortious conduct" (Resp. Br. 35), the arguments the respondent makes on "contract" when placed in a crucible of analysis leave a precipitate of nothingness.

As a reply to the brief of the respondent and in support of the Conclusion set forth in petitioner's main brief, this brief is

Respectfully submitted,

SIDNEY A. SCHWARTZ
EDWARD ASH
Counsel for Petitioner

SUPREME COURT, U.S.
MAR 1 1955

IN THE

Supreme Court of the United States

October Term—1954

No. 157

IVAN STEVEDORING CO., INC.,

Petitioner,

—v.—

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER TO THAT OF THE UNITED STATES, AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

October Term—1954

No. 157

RYAN STEVEDORING CO., INC.,

Petitioner,

—v.—

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER TO THAT OF THE UNITED STATES, AS AMICUS CURIAE

In the view petitioner took of the questions presented to this Court, the construction of the statute here involved was the first question for determination. It is palpably clear, petitioner submits, that, if the petitioner's contentions respecting the statute are held to be correct by this Court, then all other questions become moot.

In that posture of the matter and to preserve what petitioner believes is a logical sequence, petitioner in this reply brief will address itself first to the Government's argument respecting the statute involved (44 Stat. 1424, 33 U. S. C. §901 *et seq.*, 33 U. S. C. A. §901 *et seq.*), which is Point II of the Government's brief, pages 37 to 52 thereof.

Replying to Point II, Pages 37 to 52

Upon the argument of this matter on March 3, 1955, counsel for the Government frankly *conceded* in answer to a question of the Court, that the Government, speaking through him, did not know and could not say who was embraced by the legislative words (Sec. 5, 905 of 33 U. S. C. A.).

> "* * * *anyone otherwise entitled to recover damages from such employer* at law or in admiralty on account of such injury or death * * *." (Italics supplied.)

Government's counsel suggested that the words meant to embrace "second" wives. How "second" wives could be so embraced by these words escapes appreciation, especially where this Court has disallowed death benefits to a "lawful" "widow" by reason of her marital and extra-marital activities which disenfranchised her from the statute's protection (*Thompson* v. *Lawson*, 347 U. S. 334, 74 S. Ct. 555).

Certainly, the Congress could not have meant what the Government suggests. Further, the Congress certainly was not using meaningless language. It meant what it said, *viz.*; "*anyone* otherwise entitled to recover damages from such employer," which includes the shipowner. Thus, the Court of Appeals of Maryland in *Standard Wholesale Phosphate & Acid Works* v. *Rickert*, 193 Md. 20, in passing on this question *directly* and not by dictum,[1] said (p. 30):

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1 The Government, in footnote 37 at page 47 of its brief, states that the *Standard* case "involved a situation in which apparently the employer owed no independent duty to the third party which in turn was itself guilty of serious negligence." A fair reading of the decision will show that, despite the *contractual* relationship between shipowner and stevedore, and with *no* discussion as to the serious negligence of the shipowner, as urged by the Government, the Court of Appeals for Maryland held this statute to bar a claim to a claim of indemnity by the shipowner against the stevedore.

"We think the appellant (shipowner) falls *squarely* within the definition of 'anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury.' *It follows that his right to indemnity or contribution is foreclosed by the Act*, and hence the employer cannot be impleaded." (Parenthetical and italics supplied.)

If the liability of the employer for those benefits provided for by the Act is the "exclusive" liability to "anyone (such as the shipowner) otherwise entitled to recover damages from such employer" the *statutory* scheme would not be violated in *any* respect.

Such a construction would grant the benefits, provided for by the statute, to the injured longshoreman or harbor worker and it would circumscribe the liability of the employer. The employer would know that his liability would be fixed and circumscribed as to amount in a personal injury case by §908 of 33 U. S. C. A. and §909 of 33 U. S. C. A. in a death case.

If the construction contended for by the Government were followed to its logical end, you would have a fixed liability under the statute[2] where the employer was *solely* negligent and a complete open liability, the amount of which would be determined by the trier of the facts, where the employer's negligence or fault *joined* or *concurred* with that of the third party, the shipowner. In this very case the "dollar difference" (if we assume *arguendo* that the

2. In this case, in view of the type of injury, the petitioner's liability for compensation benefits would not have exceeded $11,000. §914 (m) of 33 U. S. C. A.

injured longshoreman would be entitled to the maximum of $11,000) to the employer-stevedore is $64,000.[3]

To petitioner it seems anomalous that it is *penalized* to that extent as a minimum where it has been held at fault with another and yet its liability would have been circumscribed if it were *solely* at fault.

The greatest fault or delinquency, *i.e.*, "sole" negligence, results in circumscription of liability and concurrent or joint fault projects the sky as the limit.

No clearer rebellion against such an inequitable result can be found than is found in *Standard Wholesale Phosphate & Acid Works Inc.* v. *Ruckert Terminal Corporation*, 193 Md. 20, 29-30:

> "In the absence of waiver, the employer's conformance with the statute, by providing compensation in all

---

3 The Government has injected at pages 49, 50 and 51 considerations of insurance and makes the bald statement at page 50 that "As a matter of fact, moreover, petitioner is probably protected by its standard compensation policy." The petitioner certainly does not wish to argue dehors the record. However, as petitioner pointed out in its reply brief when it was seeking a writ of certiorari, it only has limited coverage of $25,000 under One (b) of its standard compensation policy. Such coverage is normally provided to a stevedore-employer under a Workmen's Compensation Employers' Liability Policy and such coverage would take care of a liability imposed by law upon the stevedore-employer in favor of a shipowner if the latter were held liable to a stevedore's employee. This points up the financial loss, in the case $50,000 (with possible interest and costs from the date of the judgment), that the petitioner will suffer if the "exclusive" liability under the statute here involved is not held to be the measure of the stevedore's liability. It also points up the completely fallacious argument of the Government at page 51 of its brief that the employer, if it had title under §933 (b) of 33 U. S. C. A., would still bring an action against a shipowner. The Government forgets that where there is an award, title to a third party action (§933 [b]) would pass to the compensation carrier (§933 [i]) and, although it would enure to the benefit of the compensation carrier to recoup its lien (*Fontana* v. *Grace Line*, 205 F. 2d 151, affirming 106 F. Supp. 461; *The Etna*, 138 F. 2d 37) and distribute the excess to the employee (§933 [e] [2]), the stevedore, as an *impleaded* party, as here, would still have the same exposure to an uncertain and open ended liability as the petitioner has. In that state of affairs would such an action be brought?

cases regardless of fault, prevents recovery against him on the ground of negligence. The statute declares his liability for compensation to be exclusive. If it should be construed to preserve his liability, for the payment of a sum measured in whole or in part by the damages sustained by the employee, merely because the negligence of a third party concurred, or is claimed to have concurred, with his own in producing the injury, his liability for compensation would not be exclusive. It is probable that his liability would in most cases exceed the limits set up in the statute. We think it is immaterial whether his liability to a joint tort feasor stems from a statutory right to contribution or from general principles of the admiralty law. In either event it is essentially a liability to pay, or share in the payment of, damages for the injury to his employee, of which the statute relieves him."

To construe the statute other than as is contended for by the petitioner is to open a hole in a dike and to destroy the basic principle of compensation. For, as Judge McCulloch of Oregon said in *Johnson* v. *United States*, 79 F. Supp. 448, 449:

"As well say the employer can be offered to the injured workman as a co-defendant under Admiralty Rule 56, 28 U. S. C. A. following section 723. *The difference is a matter of words only.*" (Italics supplied.)

Admirably answering the untenable argument of the Government is the reasoning of Crane, *Ch. J.*, in his dissenting opinion in *Westchester L. Co.* v. *Westchester C. S. E. Corp.*, 278 N. Y. 175. There, he said (pp. 184-185):

"The employer for an accident causing death to an employee, is liable for the amounts stated in the Com-

pensation Law, and is not liable beyond that to any one upon any cause of action arising out of the death. What has been done below in this case is a violation of this statute under this constitutional provision, *for it makes the employer liable indirectly in an amount which could not be recovered directly.* The employee or the representatives for this accident had no cause of action against the employer; the remedy was solely under the Workmen's Compensation Law, and for the amounts stated therein. This is conceded. Yet because a third party paid the employees' representative it is permitted to recover the payment from the employer. In other words, the representatives receive a large sum of money through a negligence action from the employer merely because the money passes through the hands of a third party; and yet all concede that the employer is not liable to the representatives. *To me this is mere sophistry.*" (Italics supplied.)

Government counsel upon the argument advanced the suggestion that if the statute were construed as contended for by petitioner there might be a constitutional problem involved. Obliquity of reference in its brief to constitutionality, by speaking of a *quid pro quo* to the employee and none to the shipowner, necessitates brief reply.

We are not dealing with a *vested* right to indemnity in favor of the respondent prior to the passage in 1927 of the Act here involved. The cause of action for indemnity, if it exists at all in the general maritime law,[4] arose on July 20, 1949, the date when the longshoreman was injured or on the date when the respondent actually paid the judgment in favor of the longshoreman against it.

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4 The Court is respectfully referred to Point II of petitioner's main brief for a discussion respecting this subject.

Unless the respondent had a vested right in the law, its right to indemnity, if it ever existed under the general maritime law, was abolished by the statute here involved at least 22 years before such a right came into being. For a complete reply to the Government's oblique argument respecting constitutionality, the Court is respectfully referred to:

Silver v. *Silver*, 280 U. S. 117;
Wilmington Star Mining Co. v. *Fulton*, 205 U. S. 60;
Mountain Timber Co. v. *Washington*, 243 U. S. 219;
United States Light & Heat Corp. v. *Niagara Falls G. & E. L. Co.*, 47 F. 2d 567;
Coates v. *Potomac Electric Power Co.*, 95 F. Supp. 779.

and the discussion respecting these authorities and the question of constitutionality, which is to be found at pages 4 to 6 of petitioner's reply to the respondent.

If the statute here involved is construed as contended for by petitioner, the longshoremen and labor generally gain for these reasons. As long as the stevedore-employer remains in any law suit as a party, albeit only as third party defendant, with the statute as no defense and therefor with an open and limitless exposure, the stevedore-employer must handle such a law suit like any other defendant. It must seek to defeat the longshoreman at the very threshold of his action. In the selection of the jury the employer would be allowed the usual challenges given to a defendant in a law suit. The employer would have the right to address the jury at the opening of the matter and to sum up at the end of the trial. The employer would advance those arguments which would defeat plaintiff's (its employee's) recovery against the shipowner-defendant.

The employer's evidence would manifestly be pointed to the exoneration of the shipowner. Only by such means could the stevedore-employer hope to have the shipowner exonerated at the hands of the trier of the facts. With the defeat of the plaintiff-longshoreman any right over by the shipowner would become moot. Thereby, the longshoreman would be relegated to compensation and the employer's liability would become circumscribed and it would be covered by the compensation policy the employer is obligated to obtain.

Further, with the elimination of the stevedore by reason of the statute being read as contended for by the petitioner, settlements of actions brought by longshoremen against the shipowner would be more readily made since there would be no arguments between a defendant-third party plaintiff and a third party defendant as to who was liable and what each should pay.

No matter which way one turns, we come back to the place of beginning, *i.e.*, legislative intent, reasoning, divorced from sophistry, and practical considerations commend themselves to this Court's upholding petitioner's argument respecting the statute here involved.

Replying to Point I, Pages 20 to 36

The Government would have this Court believe that the body of law that governs the instant matter, in so far as indemnity is concerned (and parenthetically the Government does not state that this Court ever under the general admiralty law, where the parties are aligned as they are, in this, a maritime non-collision personal injury action, held indemnity to exist), would grant indemnity merely for a so called breach of contract.

We think it is fair to state that the greatest number of cases dealing with indemnity will show the parties, indemnitee and indemnitor, to be in a *contractual relationship* to one another. Irrespective of that fact, indemnity under the authorities is not granted for a mere breach of contract, so called, but indemnity is granted on tort principles which in turn are governed by the quality of the negligence of the indemnitor and indemnitee.

In the instant matter, whether the proceedings between the respondent, as defendant-third party plaintiff, and the petitioner, as a third party defendant, are looked upon as being ancillary to the main action of the injured longshoreman against the respondent or whether we envision a separate action being brought by the shipowner against the stevedore-employer, after the shipowner has been held liable to the stevedore's employee and has paid such a judgment, nonetheless the quality of the negligence of the putative indemnitee must be first resolved.

Thus, we find a classic example of the mechanics of trying a matter of this kind as well as the substantive law to be applied, in so far as indemnity is concerned,[5] in *McFall* v. *Compagnie*, 304 N. Y. 314. As that decision will indicate the stevedore, Transoceanic Terminal Corporation, was under contract with Compagnie Maritime Belge, the ship-

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5 Whatever the Court said in the *McFall* case respecting the construction of the statute here involved is pure dictum for the Court with commendable frankness said (p. 331 of 304 N. Y.):

"*Although it is not urged here*, passing mention should be made of an affirmative defense raised by Transoceanic but dismissed by the Trial Judge as insufficient in law. * * *" (Italics supplied.)

The New York Court of Appeals not only was influenced by its interpretation of its own compensation statute, as construed in *Westchester Lighting Company* v. *Westchester C.S.E. Corp.*, 278 N. Y. 175, but also by Judge Froessel's decision in *Barbara* v. *Ransom*, 191 Misc. 957, when he was a Justice of the lower Court, Supreme Court of the State of New York, long before the body of law in the federal courts on this subject had developed.

owner. The jury, the trier of the facts there, held that the shipowner was merely passively negligent and therefore was entitled to recover against the *contracting* stevedore. The Appellate Division of the Supreme Court reversed. The New York Court of Appeals, in reversing the Appellate Division, outlined the substantive law applicable in these situations (all of which is based upon tort principles of indemnity, implied in law, revolving around the quality of the fault of each of the wrongdoers) and held that the question of who as between the shipowner and contracting stevedore was the active or passive tort feasor was a question of fact for the trier of the facts, in that case the jury.

Looking to the case *sub judice*, it will be appreciated that the petitioner has maintained throughout that the respondent here, recognizing the principles that have always prevailed in this type of case, alleged a cause of action in its third party complaint against the petitioner herein based upon negligence (R. 12, 13). The respondent had to cast its third party complaint in allegations of active-passive negligence. It had no express, unequivocal hold harmless agreement by which the petitioner agreed to indemnify the shipowner for the latter's active negligence. It appreciated that it could not allege a mere breach of contract to perform stevedoring services and stop its allegations there.

For, if a putative indemnitee without any consideration of the quality of its negligence which has held it liable to a putative indemnitor's employee could recover indemnity against the putative indemnitor merely for a *breach of contract* and by an action based *solely* on breach of contract, there never would be any need to construe indemnity provisions or "save harmless" provisions in a contract between the putative indemnitor and putative indemnitee. There would never have been the need for such decisions as

American Stevedores v. *Porello*, 330 U. S. 446, 457; *United States* v. *Wallace*, 18 F. 2d 20; *Weldon* v. *United States*, 65 F. 2d 748; *Washington & Berkeley B. Co.* v. *Pennsylvania S. Co.*, 215 F. 32; *Kokusai Kisen Kabushika Kaisha* v. *Columbia Stevedoring Co.*, 23 F. Supp. 403, aff'd 100 F. 2d 1016; *Thompson-Starrett Co.* v. *Otis Elevator*, 271 N. Y. 36; *Broderick* v. *Cauldwell-Wingate Co., Inc.*, 305 N. Y. 872, aff'g 281 App. Div. 905.

From these decisions it will become crystal clear that the respondent here had to allege what it did. It has been held liable *for its own negligence and not because of any allegedly negligent performance of the petitioner's contract to stevedore the vessel having been imputed to respondent.*

The mere breach of the contract would not *per se* render the stevedore liable. You must, in the absence of an unequivocal agreement to indemnify, look at the quality of fault.

This is *not* a case of the negligence of a servant or agent being imputable to a master and casting the master into liability to a third person, discussed at length by the Government in Points I and II. It is a case of independent contractors.

If a mere breach of a contract to properly perform services would render the contractor, here, the stevedore, liable, you would have neither decisions construing "hold harmless" agreements nor decisions dealing with the *quality* of fault of the parties in contractual relation to one another.

The Trial Court as the sole trier of the facts denied recovery over under the applicable authorities by reason of the affirmative negligence of which he found the respondent to be guilty.

In that posture of the matter, and as petitioner has argued in its main brief and brief in reply to the respondent herein, the scope of review by the Court of Appeals was limited to a consideration of the record supporting the inferences and findings made by the Trial Court. If this matter had been tried entirely before a jury and the jury had given the longshoreman a verdict against the shipowner, the respondent herein, and then had denied to the latter any right of recovery over against the petitioner herein, under a proper charge of the substantive law as is set forth in petitioner's brief herein and in the *McFall* case, *supra*, we think there can be little question respecting the scope of review by the Court of Appeals for the Second Circuit in view of this Court's holding in *McAllister* v. *United States*, 75 S. Ct. 6.

Indeed, as recently as February 28, 1955, this Court in *Boudoin* v. *Lykes Brothers Steamship Co., Inc.*, No. 406, October Term 1954, in stating the applicable principles of law dealing with a warranty of seaworthiness in an assault case held that the record supported the District Court's findings and inferences as to the disposition of the seaman there involved.

It is therefore respectfully submitted that the finding and determination of the Trial Court here on the proposition of the quality of the fault of the parties to this matter and a denial of any recovery in favor of the respondent against the petitioner are amply supported by the record.[6]

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6 However much the Government inveighs at page 28 of its brief against the *uncontradicted* testimony of the cargo mate of the respondent herein, nonetheless the testimony is in this record and dictated the Trial Court's findings and conclusions. Whatever the authorities, set forth at page 28 of the Government's brief, may say with respect to a captain retaining responsibility only in so far as the stability of the ship is concerned cannot determine the cargo mate's duties in this case for the uncontradicted testimony from his own lips shows that the cargo mate factually was concerned with the ship, the cargo, the safety of the cargo and the safety of the discharging longshoremen.

CONCLUSION

For the reasons stated herein and for those set forth in petitioner's main brief and in petitioner's reply to the respondent herein, it is respectfully submitted that the judgment in the Court below should be reversed and that the judgment entered in the United States District Court should be reinstated with costs to the petitioner in this and in all other Courts.

Respectfully submitted,

SIDNEY A. SCHWARTZ,
EDWARD ASH,
Counsel for Petitioner.

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In the

Supreme Court of the United States

OCTOBER TERM—1955

No. 4

RYAN STEVEDORING CO., INC.,

Petitioner,

—v.—

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

PETITIONER'S OBJECTIONS TO MOTION OF THE AMERICAN MERCHANT MARINE INSTITUTE, INC., TO FILE BRIEF AS *AMICUS CURIAE*

SIDNEY A. SCHWARTZ
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In the

Supreme Court of the United States

OCTOBER TERM—1955

No. 4

RYAN STEVEDORING CO., INC.,

Petitioner,

—v.—

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

PETITIONER'S OBJECTIONS TO MOTION OF THE AMERICAN MERCHANT MARINE INSTITUTE, INC., TO FILE BRIEF AS *AMICUS CURIAE*

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

On February 28, 1955 this Court denied the prior application of the American Merchant Marine Institute, Inc., to file a brief as *amicus* in this matter.

The prior application, so denied, did not present any question of law or fact which had not been adequately presented by the parties herein.

Now comes the American Merchant Marine Institute, Inc., again and in its present application it again fails to demonstrate any questions of law or fact which have not been adequately presented by the parties herein. Its present application is as devoid of compliance with Rule 42(3) of this Court as was its prior application.

It does not show that the respondent, on whose side it seeks to align itself, has not raised all the questions of fact or law which are presented by this case.

The similarity of argument and approach between the applicant's brief and that of the respondent indicates quite clearly that the applicant merely echoes the respondent's arguments. Petitioner assumes that the weight of numbers on one side of any proposition adds nothing to the disposition that should be made of any given proposition.

The only difference between the prior application and the instant one is the citation of some three recent decisions with which the Institute is concerned. How those recent cases are germane to this matter is not outlined at all.

Indeed, the fallacy of the applicant's approach to the factual problem and the questions of law which have been presented to this Court by the petitioner and the respondent is best seen in the applicant's statement that its brief emphasizes the need for a right of indemnity to exist where "one who has done no fault may recover from the wrongdoer."

The applicant has lost sight of the Trial Court's opinion in which the *fault* of the respondent was clearly outlined as follows (R. 316; 317):

> "In accordance with the allegations of plaintiff's complaint, and in line with the theory upon which the case was tried, the jury was charged as to unseaworthiness and negligence.
>
> . . . . . .
>
> "In my judgment there is sufficient evidence in this record to justify a finding of negligence on the part of Pan Atlantic by the jury, and also, pursuant to the stipulation of the parties, for the Court to make such

a finding with respect to the issues raised by the third party complaint."

In affirming the injured longshoreman's recovery against the respondent herein, the Court of Appeals, 2nd Circuit, again found the *fault* of the respondent in this record. It said (R. 326):

"There was ample evidence to support a jury verdict on either or both negligence or unseaworthiness."

If this proposed *amicus* seeks to discuss the fundamental principle "that one who has done no fault may recover from the wrongdoer," then the above-entitled action, in which the respondent has been found at *fault* by all Courts, is not the one in which this proposed *amicus* should seek intervention.

Since it is palpably clear that the renewed motion and brief of this proposed *amicus* is nothing more than a "ditto" mark of the respondent's brief and since its prior application has been denied by order of this Court, the petitioner's objection to the renewed motion of this proposed *amicus* should, it is respectfully submitted, be sustained and the motion for leave to file a brief as *amicus* should be denied.

Respectfully submitted,

SIDNEY A. SCHWARTZ,
Counsel for Petitioner

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In the

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OCTOBER TERM—1955

No. 4

RYAN STEVEDORING CO., INC.,

Petitioner,

—v.—

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

PETITIONER'S OBJECTIONS TO MOTION OF ASSOCIATION OF AMERICAN SHIP OWNERS TO FILE BRIEF AS *AMICUS CURIAE*

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In the

Supreme Court of the United States

OCTOBER TERM—1955

No. 4

RYAN STEVEDORING CO., INC.,

Petitioner.

—v.—

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

PETITIONER'S OBJECTIONS TO MOTION OF ASSOCIATION OF AMERICAN SHIP OWNERS TO FILE BRIEF AS *AMICUS CURIAE*

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Ryan Stevedoring Co., Inc., respectfully objects to the motion of the Association of American Ship Owners for leave to file a brief as *amicus curiae* in the above-entitled matter.

This Association sought to file a brief as *amicus* prior to the original argument of this matter and its motion to file a brief in that capacity was *denied* by order of this Court, filed March 7, 1955.

The same delinquency appears in the present application as appeared in the prior application which has been denied heretofore, *viz.*, the applicant has failed to show facts or questions of law that have not been or will not be adequately presented by the parties hereto.

The reason why the applicant has not set forth questions of law or fact which have not been presented by the parties to this matter is that it cannot set forth such questions. Nowhere does this applicant show how the respondent, for whose benefit it seeks to file a brief, has failed to adequately present the shipowners' arguments.

What the applicant actually attempts to do by the instant application is to have this Court reconsider its application, heretofore denied, without any additional factor being presented except the thus far unrequited hope of the Association to have weight of numbers of *amici* of shipowners impress the Court with the argument which has been advanced by Pan-Atlantic Steamship Corporation, the respondent herein.

By reason of the instant application being devoid of any presentation as is required by Rule 42(3) of this Court, the motion of said Association to file a brief *amicus* should be denied and it is to that end that petitioner's objections are

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 137

RYAN STEVEDORING CO., INC.,

Petitioner,

v.

PAN-ATLANTIC STEAMSHIP CORPORATION;

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the

Supreme Court of the United States

October Term, 1957

No. 157

Ryan Stevedoring Co., Inc.,

Petitioner,

v.

Pan-Atlantic Steamship Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

In 1949, a longshoreman named Palazzolo, in the employment of Ryan, a stevedoring company which is the petitioner here, was injured while he and other employees of Ryan were discharging a cargo of rolls of paper pulp aboard the S. S. Canton Victory, then lying at a pier in Brooklyn, N. Y.

The respondent, Pan-Atlantic, was the bareboat charterer of the vessel and, therefore, will be treated herein as the owner of the vessel.

Palazzolo sued Pan-Atlantic on the sole and exclusive theory that the stowage of rolls was improper. If proved, this would necessarily make the vessel unseaworthy as to her stow.

Ryan had actually stowed this cargo at Georgetown, S. C., so the case is an uncommon one where the same

stevedore both created the stow at one port and discharged the same cargo, which remained undisturbed in the interim; at another port.

Palazzolo proved to the satisfaction of a jury that at Georgetown, S. C., Ryan had failed to insert under the bottom rolls adequate pieces of wood or chocks which would prevent the rolls from coming loose, rolling uncontrolled at the time when the cargo was being discharged and striking Palazzolo. Thus, the vessel was found unseaworthy because of the improper stow. The jury fixed his damage at $75,000.

The Court of Appeals for the Second Circuit unanimously affirmed Palazzolo's judgment against Pan-Atlantic, on the ground that the latter had a non-delegable duty to provide him with a safe place in which to work and a seaworthy vessel. The Court decided that while indisputably Ryan had affirmatively created the stow which the jury had found improper and unseaworthy, that fact was no defense against Palazzolo, so far as Pan-Atlantic was concerned, because of the absolute and non-delegable character of the duty imposed by the law on shipowners.

Upon the affirmance, Palazzolo's judgment was paid and, thus, the issue between the injured longshoreman and the shipowner has been finally resolved. All of his legal rights have been fully satisfied and the petition for certiorari is a matter of no interest to the injured man.

While Palazzolo's action was pending against Pan-Atlantic, the latter sued Ryan (using procedurally Rule 14 of the Federal Rules of Civil Procedure) to procure indemnity for any damage Pan-Atlantic might sustain as the result of Palazzolo's action, if his recovery was based on the fact that the stowage at Georgetown, created by Ryan, was improper. One of the theories upon which this claim was based was that if Ryan's breach of its implied warranty to do a reasonably proper job of stowing the cargo caused the vessel to become unseaworthy and thus created a species of liability without real fault on the part

of Pan-Atlantic vis-a-vis Palazzolo, then Pan-Atlantic should have indemnity against Ryan for breaching its contract and causing Pan-Atlantic's obligation to come into being.

Although the question of indemnity between shipowner and stevedore is most commonly covered by contract provisions, Pan-Atlantic was compelled to seek common law indemnity because the contractual arrangements between Pan-Atlantic and Ryan were informal and unusual (R. 34, 35, 295-300). They consisted of two memoranda and two letters referring only to the price Ryan would receive for stevedoring vessels operating in the coastwise service of Pan-Atlantic (R. 36-42). This rare situation existed because Pan-Atlantic and Ryan were wholly owned subsidiary corporations of a common parent, namely, Waterman Steamship Corporation, which was "servicing" the vessel for Pan-Atlantic in the Port of New York at the time of the accident (R. 29, 48-54).

Ryan defended against Pan-Atlantic's claim for indemnity on the ground that Ryan, as Palazzolo's employer, had obtained insurance to cover its obligations *to Palazzolo* under the U. S. Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. 901, *et seq.*) and thereby became legally incapable of any obligation of any description for anything *to Pan-Atlantic* (R. 20, 21).

Ryan tested the validity of that affirmative defense, which lies at the heart of the petition for certiorari, by motion for summary judgment (R. 30-42) which was denied by the District Judge (R. 43-45). The threadbare argument was repeated to the Trial Judge (Petition, 5) and the Court of Appeals for the Second Circuit (Petition, 15). Neither Court would dignify this desperate "defense" even by discussion in their opinions (111 F. Supp. 505; 211 F. 2d 277).

This case no longer presents any problem of Ryan's compensation insurance carrier as such, although that carrier, American Mutual Liability Insurance Co., may

well have another insured obligation which it seeks to avoid. The compensation carrier had a right under the law (33 U. S. C. A. 933) to recoup from Palazzolo's recovery what it had previously spent for medical expenses and compensation paid to Palazzolo. Such a judgment in the amount of $12,797.36 was entered in favor of the insurance company (R. 360, 361) and was fully paid upon the affirmance of Palazzolo's judgment by the Court of Appeals.

There was one basic issue of fact common to the separate disputes between Palazzolo and Pan-Atlantic and between Pan-Atlantic and Ryan, namely, whether the stow created by Ryan at Georgetown was reasonably safe. All claims were tried at the same time, Palazzolo's being tried to a jury and Pan-Atlantic's claim for indemnity against Ryan being left for decision by the Trial Court, if Palazzolo received a judgment. There was no dispute of fact between Ryan and Pan-Atlantic, the facts were stipulated by counsel (R. 295-302) and Ryan did not call any witnesses (R. 302).

The Trial Court denied the claim for indemnity because the vessel had a second mate aboard, watching the cargo being stowed during four of the twenty hours the vessel was being loaded at Georgetown and, in effect, the Trial Court held it was the vessel owner's obligation *as to the stevedoring corporation* (not an injured longshoreman) to see that the stevedore did that good, workmanlike job which it was paid to do (R. 358, 359). Actually, the uncontradicted testimony of the mate (quoted by the petitioner in fragmentary fashion at pages 6 and 7 of the petition) demonstrated that all five hatches were worked during loading at Georgetown (R. 240); the mate on watch would not spend all of his time in any particular hold and would be all over the vessel (R. 259); the mate had no authority to direct any of Ryan's men in the manner of loading the cargo and did not supervise the detail of the stow (R. 259, 260); there were proper chocks on the vessel and the dock (R. 260); the mate had seen Ryan's men use proper chocks

aboard the vessel from time to time during the loading of this cargo but it would not be possible for any mate who did not remain continuously in one hold to know whether, in fact, all of the rolls would be properly chocked, or if, indeed, they were chocked at all (R. 264). All of the witnesses on the subject were in harmony that once the bottom layer has been fully stowed, it is physically impossible for anyone to tell whether the rolls have been chocked or secured, or, if they have been secured, the nature of the material used (R. 91, 261, 262, 270).

The Court of Appeals reversed the erroneous decision of the District Court, referring to the admitted fact that "the improper stowage (was) the primary and active cause of the accident" (R. 372). Indeed, it was the *only* cause of the accident ever assigned by Palazzolo and the only cause which could possibly sustain Palazzolo's recovery. The Court said that "Ryan was obligated by implied contract to perform the work in a reasonably safe manner. This duty Ryan breached; * * *." The petition does not challenge either statement.

Grounds why the Cause should not be Reviewed

1. The facts here are peculiar and are not appropriate for the promulgation of rules to be generally applied. The issues presented by the petition are sham from a practical point of view. The petitioner's argument that Ryan's compliance with the U. S. Longshoremen's & Harbor Worker's Compensation Act insulates it from Pan-Atlantic's right of indemnity, based on Ryan's breach of contract, is specious. This has been discredited by every appellate court to which it has been presented. The petitioner does not claim, even obliquely, that there is any conflict among the decisions in the various courts of appeals on this matter.

2. The petitioner's stated understanding to the contrary (Petition 7) the issue of common law indemnity cannot be

of any importance peculiar to the "shipping industry." This common law principle is not maritime in character. Its origins, development and most frequent application are in terrene matters upon which this court has spoken authoritatively since at least 1896.

3. The petitioner's argument that there is no difference between the legal concepts of indemnity and contribution is based solely on rhetorical language, lacks substance and is totally erroneous.

4. The petitioner's threat that in the future it and its compensation insurance carrier will prevent the possibility of common law indemnity by violating the law and depriving injured longshoremen of their legal rights is as detestable as it will prove impossible.

5. The scope of appellate review by the court of appeals has in no way been made uncertain by its decision in this case, especially since there was no dispute of fact between Pan-Atlantic and Ryan and the latter called no witness, the facts having been stipulated by counsel (R. 295-302).

6. The decision by the Court of Appeals for the Second Circuit was fair, just and equitable as between Pan-Atlantic and Ryan, particularly considering the nature of the Trial Court's charge to the jury.

ARGUMENT

Under the peculiar facts of the case, Ryan's compliance with the U. S. Longshoremen's and Harbor Workers' Compensation Act is too obviously foreign to Pan-Atlantic's claim for indemnity based upon breach of contract by Ryan, to warrant the issuance of a writ of certiorari.

The case is odd in that one subsidiary corporation has sought and received indemnity from another subsidiary corporation and both are subsidiaries of a common parent.

Obviously the situation is unique because indemnity can accomplish nothing of value and is not sought in the usual case of subsidiaries. It would simply be taking money out of one pocket and putting it in another. That issue would hardly seem one justifying review by this Court.

The Record is silent on the question of insurance (other than Ryan's compensation insurance) but if one is to assume that "substantially all maritime risks are insured" (*Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515, 518, certiorari denied, 343 U. S. 966) then the real issue would be whether Ryan's insurance company or Pan-Atlantic's insurance company should ultimately bear the loss. If such be the issue here, again, the issue would not appear to be one warranting further consideration.

Leaving for later discussion the well-recognized legal right of Pan-Atlantic to have indemnity against Ryan, a case of this general nature at its inception presents two separate, distinct and unrelated lines of obligation, that is, Ryan, as an employer of Palazzolo, owed Palazzolo certain duties and Ryan, as a contractor with Pan-Atlantic, owed Pan-Atlantic certain other duties. Once one recognizes that basic fact, the heart of the petition is exposed as groundless and when one considers the factual relationship between Ryan and Pan-Atlantic, one realizes the issues tendered by the petition must really be sham.

Despite the patent fact, the petitioner refuses to recognize that Ryan's obligations to Palazzolo can have no possible effect upon its contractural obligations to others, such as Pan-Atlantic. The Record here demonstrates the obvious. When Palazzolo was injured in the course of his employment, Ryan owed to him a single and clear obligation, namely, to provide that Palazzolo receive the compensation benefits prescribed by law. This duty was absolute and unlimited by concepts of negligence or whose fault may have caused the accident or what caused it or whether Ryan was doing a good job or a poor one. Ryan procured insurance to satisfy its legal obligation to see

to it that Palazzolo received all of his rights in compensation. Palazzolo received those rights, had no cause for complaint against Ryan, never sued Ryan and, indeed, could not. Ryan thus satisfied the duties it owed to its employee, Palazzolo.

But what of Ryan's contract with Pan-Atlantic? Ryan had agreed to stow the cargo in a reasonably safe manner. Admittedly it breached its contract. Why should Ryan not be liable for breach of contract and pay as damages to Pan-Atlantic any loss it sustained, whether for damage to cargo, unnecessary detention of the vessel because of the poor stow, or judgments obtained against Pan-Atlantic by anyone injured by the stow? The argument that Ryan is not liable for *breach of contract to Pan-Atlantic* simply because it has satisfied its *compensation obligations to a Ryan employee*, is too patently absurd to warrant review here.

Running through numerous pages of the petition is the thought that some court, somewhere, has distorted or failed to recognize the clear language of the Longshoremen's and Harbor Workers' Compensation Act. No decision anywhere supports that conclusion. The language is clear and requires no interpretation in any fashion. The attempt to create confusion by argument where a statute is utterly plain is so singularly without merit, that although presented to the United States Court of Appeals for the Second Circuit, that Court, which handles all appeals in most meticulous fashion, simply ignored it. 33 U. S. C. A. 905 cannot be the subject of any honest doubt, and it is obvious to every court which has considered it, that it cannot be "construed". One cannot "interpret" the evident.

When the Longshoremen's and Harbor Workers' Compensation Act was under consideration before enactment, Congress had for solution a fundamental problem, namely, the relative rights and obligations of employer and employee. It was desired that there be enacted as Federal law a compensation statute analogous to the com-

pensation statutes then existing in many of the states of the United States. Indeed, the Federal Act is fashioned and modelled upon the New York State Workmen's Compensation Law. No one dreamed that any legislative body was doing anything other than to define, to create, or to modify employer-employee relationships. The language defining the liability of the employer is clear. It defines his obligation to his *employee* and no one else, other than those who stand in the shoes of the employee. Thus, the statute (33 U. S. C. A. 905) refers to the employee, his legal representatives, husband, wife, parents, dependents, next-of-kin, and anyone else claiming against the employer on account of the injury or death of an injured employee. It is difficult to conceive how Congress could have said more clearly that the rights of compensation are the exclusive remedy for an employee, his kin, assignees, or anyone else *who claims through him.*

Obviously, Pan-Atlantic does not claim *through* Palazzolo by subrogation or otherwise. Its claim is based upon the fact that Ryan breached its contract and, having breached its contract, should pay damages. The law has always implied that one who undertakes to do a job will do it well. This is not the result of any strained legal reasoning, but simply a matter of everyday common sense. Ryan was paid to stow the cargo properly. It did not do that, and because it failed to do the job in a workmanlike fashion, the vessel was rendered unseaworthy as to her stow and the vessel owner has been mulcted in damages. How can it be sensibly argued that because Ryan has satisfied its obligations in compensation to Palazzolo it is thus exonerated from the consequences of breaching its contract with Pan-Atlantic?

The petitioner can find no solace in searching the Congressional Record. (Petition 9, 10, 14, 15) and, in fact, admits that "these words (33 U. S. C. A. 905) are clear, unambiguous and unequivocal and no aids to legislative intent need be sought in this instance." (Petition 14) Where the Petitioner commits fundamental error is in

failing to appreciate the Act was designed exclusively to govern employer-employee relationships and, therefore, the Petitioner expresses incompletely, and in a vital matter, the purposes of the Act. At Petition 9, the Petitioner has written that Congress created under the Act a guaranteed compensation to an employee for injuries arising out of employment, regardless of any question of fault or negligence and there was created "an absolute, certain, exclusive and circumscribed liability on the part of the employer." The petitioner forgot to add the words: "to his employee."

The attempt to torture the "clear, unambiguous and unequivocal" language of the Act into a general release in favor of Ryan against the whole world for all of its acts, contracts, etc. is confessedly unreal, for the petitioner has written (Petition 20) that "the plain and obvious fact is that the Congress never contemplated and therefore had no intention in either direction respecting third party indemnity situations—this, prior to the passage of the Act, here involved, on March 4, 1927." Of course it did not have any "intention", because the problem of indemnity by contract with one not an employee is entirely alien to a workmen's compensation law. The legislators who passed the law would undoubtedly be amazed to hear it argued that employers buy with their compensation insurance not only the release of further liability to employees but as well a release of all obligations, by contract or otherwise, to the rest of the world.

The petitioner manifests concern over its "foregone conclusion that an injured longshoreman will bring action against the shipowner who in turn will implead the stevedore-employer and seek indemnity implied in law" when ever a longshoreman is injured in the stevedoring of a vessel (Petition 8). Unless groundless litigation is to be anticipated as a source of worry, the petitioner need not fret about common law indemnity so long as it does that good, workmanlike job it is paid by the shipowner to do. If Ryan had properly stowed the cargo at Georgetown

as it should have, this case never would have arisen. Its salvation from the horrors of indemnity lies in its own hands.

In similar vein, the petitioner thinks this Court's decision in *Alaska Steamship Company v. Petterson*, 347 U. S. 396, holding a vessel owner is liable to an injured longshoreman for defective gear supplied to a ship by a stevedoring company, may lead to a claim by the owner for indemnity from the stevedore. If the stevedore is bound by contract, express or implied, to supply good gear, but furnishes defective gear, so that the owner must pay damages to a man injured thereby (whether he be a member of the crew, longshoreman or business invitee) why should not the stevedore make the shipowner whole? There is nothing unfair or unconscionable about that.

The petitioner's alleged fears about general litigation involving indemnity are obviously more fancied than real. Shipowners and stevedores are businessmen, dealing with one another, in the ordinary case, by appropriate contract. Problems like indemnity are not approached by businessmen in ignorance or with despair or hopelessness. The question of indemnity can be covered by contract and usually is. For example, see *American Stevedores v. Porello*, 330 U. S. 446, 457. The contract decides a very simple question, namely, whether the stevedore's insurance company or the vessel owner's insurance company will ultimately pay the bill as between themselves, of course, leaving entirely unaffected all of the rights of an injured man as against vessel owner or stevedore.

The petitioner presents again the oft discredited argument that indemnity really amounts to a law suit against an employer by his employee, and that by using the practice of impleader, the shipowner is a "mere conduit through whom the injured employee-longshoreman recovers from his stevedore-employer." (Petition 10). Nothing could be further from the fact. The practice of impleader is but a procedure to avoid piecemeal litigation, so that while a case may present different legal issues between

different parties and many different facts and factors, any common question of fact need be tried but once. The shipowner, or one similarly situated, need not use this practice and where it is not used, the "conduit" allegation is most clearly exposed as the fallacy it really is. For example, see *George A. Fuller Co.* v. *Otis Elevator Co.*, 245 U. S. 489.

Let us assume that Palazzolo's action against Pan-Atlantic was not removed from the New York State court and Pan-Atlantic did not bring Ryan into the litigation by using the practice permitted by Section 193-a of the New York Civil Practice Act. Assume the case was tried to a jury which found Palazzolo was injured because the vessel was unseaworthy as to her stow, the rolls not having been adequately chocked at Georgetown. Who stowed the cargo would be of no interest to Palazzolo, or to Pan-Atlantic either, because the latter has a non-delegable duty to provide a seaworthy vessel. Assume Palazzolo received a judgment for $75,000 in the state court and Pan-Atlantic paid it. Has Palazzolo indirectly sued Ryan, his employer, or received anything directly or indirectly from Ryan? Pan-Atlantic's money has been paid, not Ryan's, so that the "conduit" theory is nonsense.

Assume further that Pan-Atlantic then sued Ryan in the federal court, there being diversity of citizenship, for breach of contract. This has nothing to do with Palazzolo. He has received payment of his judgment from Pan-Atlantic. In the subsequent litigation between Pan-Atlantic and Ryan, nothing could happen to affect either Palazzolo's right to recover or the quantum of his damage. His judgment had been paid and no question of his rights in compensation against Ryan ever did or could arise. The issue of breach of contract, whether expressed or implied, would be resolved one way or the other in the federal court litigation but certainly none could say Palazzolo had sued Ryan directly or indirectly or had obtained money from Ryan on the theory Pan-Atlantic was some type of "conduit."

The issues in the case as it was actually tried were not obscured by the interpleader. No more proof of the existence of separate issues need be adduced than to point out one set of issues was tried to a jury, while the other issues were tried to the court. Interpleader was proper, although not indispensable, because both Palazzolo's claim against Pan-Atlantic and the latter's claim against Ryan had a common question of fact, namely, was the stow at Georgetown proper and safe.

In concluding this phase of the argument, the respondent respectfully refers to *Westchester Lighting Co.* v. *Westchester S. E. Corp.*, 278 N. Y. 175; *Barris* v. *American Chicle Co.*, 120 F. 2d 218 (Second Circuit); *United States* v. *Arrow Stevedoring Co.*, 175 F. 2d 329 (Ninth Circuit); *Rich* v. *United States*, 177 F. 2d 688 (Second Circuit) and *Crawford* v. *Pope & Talbot, Inc.*, 206 F. 2d 784 (Third Circuit). They uniformly overrule the petitioner's argument about the Longshoremen's and Harbor Workers' Compensation Act, although the first two cited cases actually discussed the New York State Compensation Law, upon which the Federal Act was fashioned. The reasoning of all of the courts is clear. The Circuit Courts of Appeals are in entire agreement that the payment of compensation to an employee cannot have any possible effect upon the independent and different duty or obligation owed by an employer to a third party under contract, expressed or implied.

The principle of common law indemnity which has been applied in this case has been developed and is most frequently applied in cases which are not maritime in character, so any statement that the issue is of peculiar interest to the shipping industry is specious and should not warrant the issuance of a writ of certiorari.

The leading case on this subject of indemnity, recognized as falling in that classification by all courts and text writers, is *Washington Gaslight Co.* v. *District of Columbia*,

161 U. S. 316. Although undoubtedly cognizant of it, the petitioner makes no reference to this famous case, which was decided over fifty years ago. Therein, the plaintiff was under an obligation to maintain, in good order and condition, a certain gas box embedded in a sidewalk in the District of Columbia. The gas box was out of repair, and one Parker stepped into it and was injured. Parker sued the District of Columbia on the theory that a municipal corporation is liable for damages sustained by an individual when caused by an obstruction or defect in the public thoroughfare. Parker had his recovery and, then, the District of Columbia sued the Washington Gaslight Co. for indemnity. It sought to recover the full amount of the judgment which Parker had recovered against the District.

This Court held that the District of Columbia had such a right of recovery on general and well recognized common law principles. In discussing those principles, the Court referred to the fact, at pages 327 and 328, that this common law right of indemnity is not limited to cases involving municipal corporations, but is entirely general in character. The rule had previously been applied to public piers, to the right of a property owner to recover damages which he had been compelled to pay for a defective wire attached by a company to the chimney of his house, to the right of a master to recover over the damages which he had been obliged to pay because of a servant's negligence, and even at that comparatively early date, this Court said:

> "Indeed, the cases which illustrate the rule and its application to many conditions of fact are too numerous for citation, and are collected in the text books."

It is needless to multiply examples of the application of the rule and it should be sufficient to say that the leading case in the Court of Appeals for the Second Circuit is *Burris v. American Chicle Co.* 120 F. 2d 218, which involved a window cleaner who fell from a building, and

the leading case in the Court of Appeals of the State of New York is *Westchester Lighting Co.* v. *Westchester S. E. Corp.*, 278 N. Y. 175, involving the escape of gas from a gas main.

Certainly it is true that our courts have decreed indemnity time and time again where someone has been injured under circumstances amounting to a maritime tort, but, it should be remembered that such indemnity has been given, not because the indemnitee had committed a maritime tort, but, because the defendant against whom indemnity was sought had violated some obligation which it owed to the indemnitee. Examples may be found in *Standard Oil Co. (N. J.)* v. *Robbins Dry Dock & Repair Co.*, 25 F. 2d 339, and 32 F. 2d 182; *Rich* v. *United States and Barber Asphalt Corp.*, 177 F. 2d 688; *Conrao* v. *Waterman Steamship Corporation*, 75 F. Supp. 482; the *S. S. SAMOVAR*, 72 F. Supp. 574; *Seaboard Stevedoring Corp.* v. *Sagadahoc Steamship Co.*, 32 F. 2d 886; *United States* v. *Arrow Stevedoring Co.*, 175 F. 2d 329; *United States* v. *Rothchild International Stevedoring Co.*, 183 F. 2d 181 and *Lundberg* v. *Prudential Steamship Corp.*, 102 F. Supp. 115.

This common law principle, which is so thoroughly a part of our general law, was not originated or developed in the maritime field. Brief reflection upon the underlying equitable principle indicates why the rule of indemnity is of general, rather than special, application. Therefore, it is hardly candid to urge, as the petitioner does here, that the question of indemnity is of any peculiar importance or significance to the "shipping industry." That is manifest when one considers that the basis of the obligation to indemnify is never any maritime tort. It is purely accidental that the cause which gives rise to the *indemnitee's* obligation to an injured person is some event aboard a vessel, rather than an occurrence in a building or in a public thoroughfare or in a means of conveyance on land. The heart of the claim for indemnity is breach of an obligation owed *by the indemnitor* to him who seeks

the indemnity. In the case at bar that obligation is expressed in terms of implied contract, which is one of the most obvious instances for the application of the equitable rule that he who has needlessly caused another to suffer loss, should indemnify for that loss.

It is equally true that the issue of common law indemnity in this case can be of no legitimate importance whatever to that segment of the industry known as "Stevedores" because it is a matter of common knowledge that this case is factually unique, in that the same stevedore loaded and discharged the cargo, the parties are wholly owned subsidiaries of a common parent and the contractual arrangements were informal. Such facts are not to be found duplicated, commonly, in the industry. Finally, it is a matter of further general knowledge that stevedores and steamship owners usually and almost invariably resolve the problem of whose insurance carrier shall pay the loss ultimately, by the terms of the contract pursuant to which vessels are commonly stevedored. There is nothing in this issue of singular applicability to the industry, or even of maritime character, so as to warrant a review of the case by this Court.

The petitioner's failure to recognize the difference between indemnity and contribution permeates the petition, and indicates review here is unnecessary.

Almost any dictionary would define "contribution" as a "giving in common with others", and "indemnity" as a "making good or securing of another's loss." The petitioner attempts to bedevil the obvious distinction by such rhetorical quotations as "indemnity is an extreme form of contribution" (Petition 11, 22) and contribution is "partial indemnity." (Petition 11) As rhetoric the quotations may be sound, but they can form no legal basis for concluding the concepts are identical, as the petitioner has done. (Petition 22) If we refer to the famous words "death is the supreme personal tort," the petitioner would

undoubtedly conclude that all of the principles of law applicable to an action instituted by one for injury during his lifetime would be equally applicable in a death action. Syllogisms using comparatives often result in odd conclusions.

So far as a case of this general type is concerned, contribution could arise only among joint tort feasors. Two or more persons, having damaged the plaintiff pay aliquot shares as among themselves. But there is no contribution among joint tort feasors who have committed a maritime tort against the plaintiff. *Pope & Talbot Inc.* v. *Hawn*, 346 U. S. 406. Indeed, Ryan never committed any tort, maritime or terrene, against Palazzolo. So the petitioner purports to find a "morass and welter of confusion" by citing, quoting and discussing case after case dealing with contribution (which is non-existent).

While indemnity has arisen out of some tort situations in some cases, there is no necessity for a review of that problem in the case at bar, because the indemnity recovered here is predicated only on breach of contract. The action by Pan-Atlantic against Ryan is not based on any maritime tort or anything else maritime. It is simply breach of contract, implied by the law, where one has failed to do the good job for which he has been hired and paid.

The fundamental distinction is uniformly recognized in the Circuit Courts of Appeals. *American Mutual Liability Insurance Co.* v. *Matthews*, 182 F. 2d 322, 323, 324 (Second Circuit); *States S. S. Co.* v. *Rothchild International Stevedoring Co.*, 205 F. 2d 253, 255, 256 (Ninth Circuit); *Crawford* v. *Pope & Talbot Inc.*, 206 F. 2d 784, 792, 793 (Third Circuit). Obviously, there is no conflict in the Circuit Courts of Appeals and review of the pending cause is not necessary.

The petitioner's threat that it and its compensation carrier may try to deprive injured longshoremen of their legal rights in the future, should not warrant the issuance of a writ of certiorari.

33 U. S. C. A. 914 (a) provides that "Compensation under this chapter shall be paid periodically, *promptly*, and directly to the person entitled thereto, *without an award*, except where liability to pay compensation is controverted by the employer." (Emphasis supplied.)

The character of the petition generally may be judged by the threat (Petition 21) that if the petitioner is liable for common law indemnity, the petitioner and its compensation carrier will violate the law, will no longer pay compensation claims to injured workmen promptly but will insist upon a formal award before they will pay an injured man anything. This would result in an assignment of the injured man's claim against a third party allegedly responsible in negligence for having caused the injury. The petitioner says that thus the compensation carrier "would have control over any third party action." It is implicit that, having obtained such control, it would not sue the third party and in this way would prevent any question of indemnity as between the third party and the employer from ever arising. This devious plan to deprive the injured workman of his rights against a third party could never accomplish that result. The petitioner overlooks the fact that when there is a formal award, the compensation carrier becomes a fiduciary or trustee under the law (33 U. S. C. 933 (a), (b), (d), (e)).

The petitioner also forgets that this question of indemnity is of no interest whatever to any legitimate compensation carrier, as such. Where an injured man recovers from a third party, the compensation carrier recoups all of its payments. It receives this reimbursement from the third party and has no further interest in the case, if its sole role is as a compensation insurance carrier. In the case at bar, the compensation carrier has re-

ceived from Pan-Atlantic all payments the carrier had made to or for Palazzolo. It might be expected to participate with Ryan in violating the law in the future, as threatened, only if it has written another kind of insurance for Ryan whereby it will be obliged to pay the judgment for indemnity against Ryan, in whole or in part. A conflicting interest of that type might conceivably tempt some insurance company to endeavor to sacrifice the compensation rights of injured men so that other insurance obligations to others might not have to be paid.

One must view with abhorrence the petitioner's reason for this Court to grant a writ of certiorari being the petitioner's threat in its own behalf and in behalf of its compensation insurance company, in the future to breach the fiduciary relationship imposed upon them by law and to the detriment of injured workmen, in order to safeguard themselves from the liability which the law imposes in indemnity for the benefit of third persons. It should reasonably be anticipated that the first time such a nefarious scheme is essayed, the federal judiciary will brand the conduct fraudulent and take appropriate steps to thwart it.

The decision of the Court of Appeals in this case has not made uncertain in any way the scope of appellate review.

The third reason for review assigned by the petitioner (Petition 12, 13, 25, 26, 27) is just as invalid as the other assigned reasons and arguments. When all the pleadings, interrogatories, motions, testimony at the trial, judge's charge—in short when the whole record—is studied it is seen that the matter between Palazzolo and Pan-Atlantic was reduced to an issue very simply stated. The one and only basic issue in the case was the propriety of the cargo stow at Georgetown. There was no dispute of any fact between Pan-Atlantic and Ryan. The contest at the trial was between Pan-Atlantic and Palazzolo on this question of whether the stow was proper. The jury's verdict in

behalf of Palazzolo established that the stow was not proper. It was admitted that Ryan had actually created the stow, and so the issue for determination by the trial judge was one of law, namely, under these facts now admittedly established, is Pan-Atlantic entitled to indemnity from Ryan. The trial judge committed error in deciding the issue of law and reached the unjustified conclusion of law that the parties were joint tort feasors. The trial judge overlooked the fact that Ryan was not and could not have been a tort feasor. He misconceived, misinterpreted, and in his opinion misstated the legal position taken by Pan-Atlantic.

With the facts established beyond all further question in the fashion indicated, the Circuit Courts of Appeals have always felt they are entirely competent to correct a district judge who has applied the incorrect rule of law to the facts, and this is what the Court of Appeals for the Second Circuit did here.

One need not be concerned over the question of words such as "primary" or "active" or "secondary" or "sole." It simply is the fact that Palazzolo recovered because of an improper stow and Ryan did, in fact, create that stow. Obviously what the Court of Appeals has done in this case is in accordance with accepted, usual and time honored practice. In no sense did the Court of Appeals reverse any finding of fact but rather it applied the proper rule of law to the facts which became undisputed once the jury had spoken.

The decision by the Court of Appeals for the Second Circuit was fair, just and equitable as between Pan-Atlantic and Ryan and should not be reviewed.

At the time of trial the charge to the jury was permeated with the concept of unseaworthiness. This idea was so interwoven with the idea of negligence that the two were inseparable (R. 320, 321, 322, 323). Sometimes it is indeed difficult for one to attempt a unitary concept of the incon-

sistent theories of unseaworthiness and negligence, since the former is a type of liability without fault (*Seas Shipping Co. v. Sieracki*, 328 U. S. 85). But, it often happens, and such is the case here, that the same facts may result in a holding of both negligence and unseaworthiness. It is abundantly clear that if the stowage of the cargo at Georgetown was improper, then, the vessel was obviously unseaworthy as to her stow. Having intermingled the two concepts of negligence and unseaworthiness in charging the jury, the trial judge changed the ground rules when it came time for him to decide the rights of Pan-Atlantic against Ryan. While he jumbled together these two concepts of negligence and unseaworthiness in his charge to the jury on the issue between Palazzolo and Pan-Atlantic, he meticulously separated the two theories when it came time to decide the issue of Pan-Atlantic against Ryan. This was really not fair and constituted a changing of the rules in the middle of the game. This, the Court of Appeals has undone.

It is also the fact that there is supporting the ultimate decision of the Court of Appeals for the Second Circuit an unexpressed but very salutary public policy. It has placed the ultimate burden on the shoulders of the one who is best situated factually to remedy the conditions which caused injury to Palazzolo and to many other workmen.

It is certainly the desire of the law, articulating what is in the public conscience, that the conditions under which longshoremen perform their hazardous work should be as safe as can humanly be achieved. The stevedores do actually control the conditions under which their longshoremen work. Theirs is the opportunity to say whether conditions are reasonably safe or not, whether their men should work under the circumstances, or what additional safeguards may be required, so that longshoremen may perform their tasks in reasonable safety. The stevedore is a specialist in the loading and discharging of cargo and, indeed, it is for that very reason work of this type is

done by stevedoring companies rather than by the ship's personnel. It is an enlightened policy that will impose upon the stevedore the ultimate responsibility, because it is the stevedore's primary right, privilege and opportunity to correct these conditions which lead to the injury of workmen. When stevedoring companies reluctantly conclude that theirs is the prime and fundamental obligation to provide a safe place to work, then, it should be expected that accidents of this character should diminish in frequency.

The "hands off" attitude of the petitioner is typical. It says in effect that it has no obligation, of any kind, nature or description, to see to it that its men work in conditions of safety. For example, at petition 23 and 25, having distorted or misinterpreted the actual testimony, it says the whole obligation rests upon the vessel owner, and it, the stevedore, who has been hired to do a good job, has no responsibility for anything, if it does not do the work in proper fashion, as it has been paid to do. The theme being that Ryan was aloof, practically to the point of indolence, and the cargo really stowed itself, the petitioner seeks to support the stevedore role of bystander, by saying that Pan-Atlantic furnished defective or improper gear to Ryan. The only proof in the record, and that proof was never disputed, was exactly the opposite, namely, there were proper chocks not only aboard the vessel but on the dock at Georgetown where the cargo was lifted (R. 269). The unmasking took place in the Court of Appeals.

Having achieved simple fairness, the Court of Appeals' determination should not be reviewed.

Conclusion

In view of the foregoing a writ of certiorari should not be issued, to which end this brief is respectfully submitted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 11

RYAN STEVEDORING CO., INC.,

Petitioner,

v.

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

RESPONDENT'S OBJECTION TO MOTION BY NATIONAL ASSOCIATION OF STEVEDORES FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* PURSUANT TO RULE 42

EDWARD J. BEHRENS,
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IN THE

Supreme Court of the United States

OCTOBER TERM 1953

No. 157

RYAN STEVEDORING CO., INC.,

Petitioner,

against

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

RESPONDENT'S OBJECTION TO MOTION BY NATIONAL ASSOCIATION OF STEVEDORES FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* PURSUANT TO RULE 42

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes the respondent, Pan-Atlantic Steamship Corporation, by its counsel, and respectfully objects to the motion made by the National Association of Stevedores for leave to file a brief as *amicus curiae*, the respondent having withheld its consent to the filing of such brief for the reasons stated herein.

The motion and proposed brief were presumably solicited by the petitioner in order to make this case appear to have

some importance or significance which it actually has not. The brief adds nothing new by way of argument either as to fact or law and constitutes really another brief in behalf of the petitioner, echoing the exact arguments already presented in the petition. Accordingly, the motion does not comply with Rule 42(3) of the Rules of this Court, which requires a demonstration that facts or questions of law have not adequately been presented by the parties.

More than a month before the petition for a writ of certiorari was presented to this Court, and, of course, before the petitioner's brief was filed, the petitioner's counsel requested from the respondent's counsel consent to the filing of a brief in behalf of an unnamed *amicus curiae*. The request for such consent was made by letter dated May 19, 1954. Obviously, the request was made at a time when no prospective *amicus* could possibly comply with the present Rule 42(3) of this Court (formerly Rule 27, par. 9(c)). By letter dated May 21, 1954, counsel for the respondent informed counsel for the petitioner that such consent would not be granted to anyone, because "frankly, I do not see how anyone intending to apply for leave to file a brief *amicus* could possibly make the allegations required by Rule 27, paragraph 9(c)."

By letter dated July 19, 1954, counsel for the National Association of Stevedores requested advices as to whether counsel for the respondent would consent to the filing of a brief *amicus*. By letter of August 4, 1954, with which counsel for the respondent transmitted to counsel for the National Association of Stevedores a copy of the respondent's brief in opposition to the petition for a writ of certiorari, it was pointed out:

> "You will see therefrom we have taken the position that the facts are peculiar and are not in any way typical of the ordinary relationship between shipowner and stevedore. We call your attention to the

fact that the parties here are wholly-owned subsidiaries of a common parent and the contractual arrangements between them were informal and unusual.

If we felt that there was something in the pending case which might classify it as a 'test' case, we would be very pleased to have briefs filed by anyone interested in the subject. We feel that this is a private fight having no effect, directly or indirectly, upon anyone other than the Underwriters for the parties concerned, and therefore we regret that we are not able to consent to your filing a brief."

The motion does not directly challenge the foregoing statement and presents merely a generality that this case has some interest to the "stevedoring industry." Although the respondent's brief was previously furnished to counsel as stated, the motion makes no reference whatever to pages 13, 14, 15 and 16 of the respondent's brief in opposition, wherein it was pointed out in detail that the principle of common law indemnity in this case has been developed and is most frequently applied in cases which are not maritime in character, that the case is factually unique and the only problem in the usual case is whether the stevedore's insurance carrier or the shipowner's insurance carrier will pay the loss ultimately.

Attempted compliance with Rule 42(3) is to be found in a single sentence in the motion, where it has been written "this point of view has not been clearly presented to this Court by the petition for a writ of certiorari herein." The point of view to which reference is made is that the U. S. Longshoremen's and Harbor Workers' Compensation Act is the sole and exclusive remedy of the whole world so far as a stevedore is concerned. Looking to the petition for a writ of certiorari we find this exact point of view presented at pages 2, 7, 8, 9, 10, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25. Further consideration of the

proposed brief shows that the same cases are presented and discussed as those contained in the petition and, in essence, the proposed brief simply echoes the "conduit" theory presented at page 19 of the petition. The fallacy of that theory has been exposed in the respondent's brief in opposition to the petition at pages 11, 12 and 13.

For the foregoing reasons, this objection to the motion should be sustained and the motion should be denied, to which end the objection is

Respectfully submitted,

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Counsel for Respondent.

SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 151

RYAN STEVEDORING CO., INC.,

Petitioner,

v.

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 157

RYAN STEVEDORING CO., INC.,

Petitioner,

v.

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

Statement of the Case

In 1949, a longshoreman named Palazzolo, in the employment of Ryan, a stevedoring company which is the petitioner here, was injured while he and other employees of Ryan were discharging a cargo of rolls of paper pulp aboard the S. S. Canton Victory, then lying at a pier in Brooklyn, N. Y.

The respondent, Pan-Atlantic, was the bareboat charterer of the vessel and, therefore, will be treated herein as the owner of the vessel.

Palazzolo sued Pan-Atlantic on the sole and exclusive theory that the stowage of rolls was improper. If proved, this would necessarily make the vessel unseaworthy as to her stow.

Ryan had actually stowed this cargo at Georgetown, S. C., so the case is one where the same stevedore both created the stow at one port and discharged the same cargo, which remained undisturbed in the interim, at another port.

Palazzolo proved to the satisfaction of a jury that at Georgetown, S. C., Ryan had failed to insert under the bottom rolls adequate pieces of wood or chocks which would prevent the rolls from coming loose, rolling uncontrolled at the time when the cargo was being discharged and striking Palazzolo. Thus, the vessel was found unseaworthy because of the improper stow. The jury fixed his damage at $75,000.

The Court of Appeals for the Second Circuit unanimously affirmed Palazzolo's judgment against Pan-Atlantic, on the ground that the latter had a non-delegable duty to provide him with a safe place in which to work and a seaworthy vessel. The Court decided that while indisputably Ryan had affirmatively created the stow which the jury had found improper and unseaworthy, that fact was no defense against Palazzolo, so far as Pan-Atlantic was concerned, because of the absolute and non-delegable character of the duty imposed by the law on shipowners.

Upon the affirmance, Palazzolo's judgment was paid and, thus, the issue between the injured longshoreman and the shipowner has been finally resolved. All of his legal rights have been fully satisfied and the present controversy is a matter of no interest to the injured man.

While Palazzolo's action was pending against Pan-Atlantic, the latter sued Ryan (using procedurally Rule 14

of the Federal Rules of Civil Procedure) to procure indemnity for any damage Pan-Atlantic might sustain as the result of Palazzolo's action, if his recovery was based on the fact that the stowage at Georgetown, created by Ryan, was improper. One of the theories upon which this claim was based was that if Ryan's breach of its implied warranty to do a reasonably proper job of stowing the cargo caused the vessel to become unseaworthy and thus created a species of liability without real fault on the part of Pan-Atlantic vis-a-vis Palazzolo, then Pan-Atlantic should have indemnity against Ryan for breaching its contract and causing Pan-Atlantic's obligation to come into being.

Although the question of indemnity between shipowner and stevedore is most commonly covered by contract provisions, Pan-Atlantic was compelled to seek common law indemnity because the contractual arrangements between Pan-Atlantic and Ryan were informal and unusual (Record, 24, 25, 268-272). They consisted of two memoranda and two letters referring only to the price Ryan would receive for stevedoring vessels operating in the coastwise service of Pan-Atlantic (Record, 26-31). This rare situation existed because Pan-Atlantic and Ryan were wholly owned subsidiary corporations of a common parent, namely, Waterman Steamship Corporation, which was "servicing" the vessel for Pan-Atlantic in the Port of New York at the time of the accident (Record, 21, 35-41).

Ryan defended against Pan-Atlantic's claim for indemnity on the ground that Ryan, as Palazzolo's employer, had obtained insurance to cover its obligations *to Palazzolo* under the U. S. Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. 901, *et seq.*) and thereby became legally incapable of any obligation of any description for anything *to Pan-Atlantic* (Record, 15, 16).

Ryan tested the validity of that affirmative defense, which lies at the heart of the petitioner's position here, by

motion for summary judgment (Record, 21-31) which was denied by the District Judge (Record, 31-33). The threadbare argument was repeated to the Trial Judge (Brief for Petitioner, 5) and the Court of Appeals for the second Circuit (Brief for Petitioner, 17). Neither Court would dignify this desperate "defense" even by discussion in their opinions (111 F. Supp. 505; 211 F. 2d 277).

This case no longer presents any problem of Ryan's compensation insurance carrier as such, although that carrier, American Mutual Liability Insurance Co., may well have another insured obligation which it seeks to avoid. The compensation carrier had a right under the law (33 U.S.C.A. 933) to recoup from Palazzolo's recovery what it had previously spent for medical expenses and compensation paid to Palazzolo. Such a judgment in the amount of $12,797.36 was entered in favor of the insurance company (Record, 319, 320) and was fully paid upon the affirmance of Palazzolo's judgment by the Court of Appeals.

There was one basic issue of fact common to the separate disputes between Palazzolo and Pan-Atlantic and between Pan-Atlantic and Ryan, namely, whether the stow created by Ryan at Georgetown was reasonably safe. All claims were tried at the same time, Palazzolo's being tried to a jury and Pan-Atlantic's claim for indemnity against Ryan being left for decision by the Trial Court, if Palazzolo received a judgment. There was no dispute of fact between Ryan and Pan-Atlantic, the facts were stipulated by counsel (Record, 268-273) and Ryan did not call any witnesses (Record, 273).

The Trial Court denied the claim for indemnity because the vessel had a second mate aboard, watching the cargo being stowed during four of the twenty hours the vessel was being loaded at Georgetown and, in effect, the Trial Court held it was the vessel owner's obligation *as to the stevedoring corporation* (not an injured longshoreman) to

see that the stevedore did that good, workmanlike job which it was paid to do (Record, 318-319). Actually, the uncontradicted testimony of the mate (quoted by the petitioner in fragmentary fashion at Brief for Petitioner, 6 and 7) demonstrated that all five hatches were worked during loading at Georgetown (Record, 217); the mate on watch would not spend all of his time in any particular hold and would be all over the vessel (Record, 234); the mate had no authority to direct any of Ryan's men in the manner of loading the cargo and did not supervise the detail of the stow (Record, 234, 235); there were proper chocks on the vessel and the dock (Record, 235); the mate had seen Ryan's men use proper chocks aboard the vessel from time to time during the loading of this cargo but it would not be possible for any mate who did not remain continuously in one hold to know whether, in fact, all of the rolls would be properly chocked, or if, indeed, they were chocked at all (Record, 236). All of the witnesses on the subject were in harmony that once the bottom layer has been fully stowed, it is physically impossible for anyone to tell whether the rolls have been chocked or secured, or, if they have been secured, the nature of the material used (Record 77, 236, 237, 245).

The Court of Appeals reversed the erroneous decision of the District Court, referring to the admitted fact that "the improper stowage (was) the primary and active cause of the accident" (Record, 326). Indeed, it was the *only* cause of the accident ever assigned by Palazzolo and the only cause which could possibly sustain Palazzolo's recovery. The Court said that "Ryan was obligated by implied contract to perform the work in a reasonably safe manner. This duty Ryan breached; * * *" (Record, 327). The Brief for Petitioner does not challenge either statement.

Ryan's petition for a writ of certiorari was granted by this Court on October 14, 1954.

Summary of Argument

I. While a right of indemnity may arise under divers situations, we need be concerned here only with indemnity arising from contract. In the light of the history preceding consideration of the problem by Congress and the entire Congressional Record, the U. S. Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. 901, *et seq.*) is strictly a law of workmen's compensation, leaving totally unaffected a contractor's obligations to those other than his employees. 33 U.S.C.A. 905 applies only to those sued as employers and in suits by employees, or those who claim through employees. The substantive rights of the parties cannot be obscured by procedural matters.

II. The right asserted here for indemnity is not maritime in character. The right has existed for at least half a century and no legislation is required to create it. No reason has been assigned to justify judicial action exempting stevedores from the full impact of existing law, and there are cogent affirmative reasons why stevedores should be held to the same responsibility as all other contractors. The petitioner's discussion of admiralty jurisdiction is not supported by the facts or the law.

III. The Trial Court intermingled negligence and unseaworthiness in its charge to the jury and then separated the ideas in deciding Pan-Atlantic's rights against Ryan. The Court of Appeals for the Second Circuit rectified this injustice, and in so doing did not make findings of fact differing from the Trial Court's. The Trial Court ignored the contractual relation of Pan-Atlantic and Ryan; the Court of Appeals applied the correct rule of law to the admitted facts.

POINT I

Ryan's compliance with the United States Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A., § 901, *et seq.*, does not bar Pan-Atlantic's claim for indemnity against Ryan.

A right of indemnity may arise from (a) tort, (b) quasi-contract, (c) express contract, or (d) implied contract. It is not the purpose of the respondent's presentation to discuss academically the possible effect of the U. S. Longshoremen's and Harbor Workers' Compensation Act on every possible right of indemnity, under all possible contingencies, and arising from every possible legal relationship. Since one ground assigned by the Court of Appeals for the Second Circuit for granting indemnity to Pan-Atlantic was the law of implied contract (Record, 327), and since the issue seems clearest to respondent's counsel when viewed against that limited backdrop, the affirmative discussion of this point will proceed fundamentally to consider the effect of the Act upon the implied contractual rights of this shipowner against this stevedore.

While the arrangements were unusual in form for the reasons indicated hereinbefore, at page 3, there was admittedly a written contract between Pan-Atlantic and Ryan (Record, 24-31; 268-272). The case does not lie in the realm of quasi-contract where, in order to achieve an equitable result, the law creates the legal fiction that a contract exists when, in fact, none does. The law of implied contract requires that there be read into an existing arrangement whatever terms necessarily and sensibly flow from the agreement in order to make the undertaking

rational and complete.[1] The written agreement in this case being silent on the subject, the law simply implies that Ryan would do a good job. Ryan breached the contract and Pan-Atlantic has suffered damage. May Ryan breach its contract with impunity, pointing to the Act for exculpation?

The main issue presented by the petition being the general scope of 33 U.S.C.A. 901, *et seq.*, and the particular compass of Section 905, the question may be stated thus:

> "When a stevedore fulfills his obligations *to his employee* by procuring compensation, does this federal law exonerate the stevedore from breaching his contract with a *shipowner?*"

In treating of the statute, one of the basic errors of the petitioner is its failure to appreciate the exact nature of

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[1] It is appreciated that a contract to stevedore cargo is maritime in character and, as to forum, may be presented to an admiralty court. But the rules of implied contract do not differ in admiralty. For example, in *Sacramento Navigation Company* v. *Salz*, 273 U. S. 326, damages arising out of a bill of affreightment were asserted in an admiralty court and the scope of a bill of lading was involved. The court said:

> "But a contract includes not only the promises set forth in express words, but, in addition, all such implied provisions as are indispensable to effectuate the intention of the parties and as arise from the language of the contract and the circumstances under which it was made (3 Williston, Contr. § 1293; Brodie v. Cardiff Corp. (1919) A. C. 337, 358—H. L.) * * *."

See, also, on the general question, Mr. Justice Holmes' opinion in *Barnes* v. *Alexander*, 232 U. S. 117, where it was written,

> "We start, however, with the principle that an informal business transaction should be construed as adopting whatever form consistent with the facts is most fitted to reach the result seemingly desired."

And *North German Lloyd* v. *Guaranty Trust Co.*, 244 U. S. 12, 24; *Watson Bros. Transp. Co.* v. *Jaffa*, 143 F. 2d 340, 348 (C. A., 8th Cir.); *Brooker Engr. Co.* v. *Grand River Dam Authority*, 144 F. 2d 708, 710 (C. A., 10th Cir.); *Nevada Half Moon Mining Co.* v. *Combined Metals R. Co.*, 176 F. 2d 73 (C. A., 10th Cir.), and *Williston on Contracts*, Vol. 5, pp. 3681-3685.

the problem which Congress there solved. Congress dealt entirely with an employer-employee relation, compensation rights and obligations *inter se*, and nothing more. Workmen's Compensation Laws of this type remove the *employee's* claim against his *employer* entirely from the realm of negligence, where the employer could defend on the grounds of negligence of a fellow servant, assumption of risk and contributory negligence. In common law actions the employee's rights and the employer's responsibilities were uncertain, both as to liability and *quantum* of damage. Compensation laws render the employer's liability to his employee absolute without regard to fault and in return therefor the amount due the employee is fixed and certain as prescribed by the law.

In 1916 this Court held that the New York State Workmen's Compensation Law could not be applied to the death of a longshoreman occurring aboard a vessel in the Port of New York. Such legislation would modify general maritime law, interfere with uniformity and, therefore, is repugnant to the Constitutional grant of exclusive power to Congress in the maritime field. *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205.

During the year after the *Jensen* decision, Congress attempted to bring longshoremen under State Compensation Laws by amending the Judiciary Act to extend the admiralty and maritime jurisdiction of the United States district courts to "claimants (asserting) the rights and remedies under the Workmen's Compensation Law of any state" (Oct. 6, 1917, Chapter 97, 40 Stat. at L. 395, Comp. Stat., § 991 (3)). Because, in effect, this statute was a delegation of exclusive Congressional authority and incorporated by reference into Federal law the various and, perhaps, discordant state statutes, its unconstitutionality was adjudged in *Knickerbocker Ice Company* v. *Stewart*, 253 U. S. 149 (1919).

Congress tried again to bring workers of this class within the state workmen's compensation statutes by the so-

called Mills Amendment (Act of June 10, 1922, Chapter 216, 42 Stat. at L. 634; Comp. Stat., § 991 (3)). In *State of Washington* v. *W. C. Dawson & Co.*, 264 U.S. 219 (1923), the law was held to be unconstitutional. There, again, this Court said that such a law, in effect, permitted each state to alter the maritime law, which must be uniform, and that Congress alone had constitutional power to act in this maritime matter. This Court pointed the way for Congress to enact legislation which would be within its constitutional authority (see pp. 227 and 228) and, thereupon, in 1927, Congress did pass the Longshoremen's and Harbor Workers' Act.

During the consideration of the proposed law, there was presented to Congress the history of the foregoing attempts to afford the protection of workmen's compensation to longshoremen. The Congressional intent, in its larger aspect, was stated by Congressman LaGuardia in Volume 68, Congressional Record, 69th Congress, page 5414 (March 2, 1927):

> "Mr. Speaker, it is quite possible to explain the purpose and necessity of this bill in two minutes. About 25 years ago, by reason of the development of commerce and industry, it became imperative to abolish the old common law defenses which could be then interposed in cases for damage accruing from injuries sustained in industry. Since then, workmen's compensation has now been applied to every branch of industry and commerce in the United States. Employers' liability and laws providing compensation have been adopted in every State of the Union. Owing to our dual form of government, we find that longshoremen are employed by companies or individuals in foreign or interstate commerce and therefore there is some question whether or not state law could be made applicable to them. In order to meet that situation, it is necessary to pass a Federal law. This is

what they are doing now. The law simply gives the longshoremen the benefit of up to date legislation to cover injuries sustained in the course of their employment. That is all there is to it. I yield back the minute of my time."

During the pendency of the matter before Congress, not a word was uttered to indicate that Congress was embarking on a legislative program beyond the limited field of compensation, dealing exclusively with employer-employee relationships. It was enacting a *compensation* law, fashioned largely upon that of the State of New York.

The petitioner can find no solace in searching the Congressional Record (Brief, 12, especially footnote 3; Brief, 19-20). Congressman Graham's quoted peroration does not detract from the inescapable conclusion that he, as well as all other legislators, understood the foregoing history of Congressional attempts and understood the Congress was considering nothing beyond a workman's compensation law. His comments on oppressiveness, so far as the employer was concerned, obviously dealt with rates of compensation, rather than the extent of the legal rights being created. What he was actually saying was that the burden of unfortunate industrial accidents should be borne by the industry rather than by the injured workman but at sensible rates of compensation.

Seemingly on the question of Congressional intention, the petitioner says that it will violate the law, to the detriment of injured longshoremen, unless it procures universal immunity from contractual obligations or a sort of judicial amnesty for violating its contracts. (Brief, 18-19)

33 U.S.C.A. 914 (a) provides that "Compensation under this chapter shall be paid periodically, *promptly*, and directly to the person entitled thereto, *without an award*, except where liability to pay compensation is controverted

by the employer." (Emphasis supplied.) The petitioner threatens that if it is liable for common law indemnity, the petitioner and its compensation carrier will violate the law, will no longer pay compensation claims to injured workmen promptly but will insist upon a formal award before they will pay an injured man anything. This would result in an assignment of the injured man's claim against a third party allegedly responsible for having caused the injury. 33 U.S.C.A. 933 (b) The petitioner says that thus the compensation carrier "would have control over any third party action." It is implicit that, having obtained such control, it would not sue the third party and in this way would prevent any question of indemnity as between the third party and the stevedore from ever arising. This devious plan to deprive the injured workman of his rights against a third party could never accomplish that result. The petitioner overlooks the fact that when there is a formal award, the compensation carrier becomes a fiduciary or trustee under the law (33 U.S.C.A. 933 (a), (b), (d), (e)).

Actually, the financial interests of legitimate compensation carriers, as such, are entirely opposed to the petitioner's ideas. When an injured longshoreman recovers damages from a third party, the compensation carrier recoups all payments made in compensation and for medical expenses; its further liability in compensation is diminished by the remaining amount of the recovery (33 U.S.C.A. 933). In the case at bar, the compensation carrier has received from Pan-Atlantic all of the payments which the carrier had made to, or for, Palazzolo. It might be expected to participate with Ryan in the threatened violation of the law in the future only if it has written another kind of insurance for Ryan, whereby it will be obligated to pay the judgment for indemnity against Ryan, in whole or in part. An insurance company having a conflicting financial interest of that type might conceivably be tempted to endeavor to sacrifice the compensation rights

of injured men so that other insurance obligations to others might not have to be paid.

It should reasonably be anticipated that when first an insurance carrier for a stevedore essays the nefarious scheme proposed by the petitioner in violation of the law, the Federal judiciary will brand such conduct fraudulent and take appropriate steps to thwart it. It is certainly difficult to understand an argument which says, in effect, the Congressional intention must have been to exonerate the stevedore from his contractual obligations to a shipowner, because if it had no such intention, the stevedore will violate the Congressional enactment.

The Petitioner really confesses that Congress had no "intention" so far as the case at bar is concerned (Brief, 18), and the reason it had no intention is fairly obvious, in that, the problem of indemnity by contract between shipowner and stevedore is quite foreign to any workmen's compensation statute.[2] So, too, the petitioner confesses by implication that the Act does not apply to contractual arrangements between stevedore and shipowner, when it recognizes that express agreements on this subject are common in the industry. (For example, see *American Stevedores, Inc.* v. *Porello*, 330 U. S. 446.)

Where there is contractual indemnity by express provision, the stevedore does not divest himself of "the aegis of the statute" (Brief, 9). In such cases, the stevedore's obligations are defined, in some instances reducing his liability for common law indemnity, and in others extending his responsibility, but withal, leaving unaffected his statutory obligations to his employees. A stevedore is impotent to alter his obligations to the latter (33

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[2] The problem of constitutional law, which would be involved if Congress intended to destroy a shipowner's contractual rights without giving him anything in return, need not be approached, because the limited purpose of the Act is so apparent.

U.S.C.A. 915). Significant it is that the Act contains no similar provision relating to agreements by a stevedore with those bearing a relation to him *other than that of employee*. One should be amazed if there were such a provision, because, in the final analysis, one must return to the point of departure, namely, Congress passed a *compensation* law. Since the Act does not bar indemnity where the stevedore and a shipowner have literally written indemnity into the contract, the Act cannot reasonably bar indemnity where the contract is silent and the law implies it, or reads it into the contract. The stevedore is no less at fault in one case than the other, and the shipowner is no less aggrieved in either instance.

From the entire Congressional Record, read in the light of history, one must conclude that the legislators who passed this law would be rather amazed to hear it argued that employers buy with their compensation insurance not only the release of all other liability to employees, but, as well, a release of all obligations, by contract or otherwise, to the rest of the world. The petitioner's position is not only opposed to the clear purposes of the statute, but when one realizes that this type of case can arise only because a stevedore fails to do that for which it has been paid, the argument is exposed as unreal, unconscionable and inequitable.

33 U.S.C.A. 905 defines the employer's liability *as an employer* to his employees and those who stand in the shoes of his employees. The statute refers to the employee, his legal representatives, husband, wife, parents, dependents, next of kin, and anyone else claiming *against the employer on account of the injury or death of an employee*. It is difficult to conceive how Congress could have said more clearly that the rights of compensation are the exclusive remedy for an employee, his kin, assignees, subrogees, or anyone else *who claims through him* against one in the status of *employer*.

In the case at bar, Pan-Atlantic has not sued Ryan *as an employer*, nor has any breach of obligation on Ryan's part *as an employer* been asserted, directly or indirectly, as the basis of Pan-Atlantic's right to recover. Pan-Atlantic does not claim *through Palazzolo* by subrogation or otherwise. Pan-Atlantic's claim has been allowed on the age-old basis that having breached its contract with Pan-Atlantic, Ryan should pay damages for that breach.

In its origins this case presented two separate and distinct lines of obligation on the part of Ryan. Because it was an *employer* of Palazzolo, it owed *Palazzolo* the obligation of procuring compensation for him under the Act. Because it was a *contractor* with Pan-Atlantic, it owed *Pan-Atlantic* the legal duty of doing a good, workmanlike job. It is inconceivable that Ryan's satisfaction of its legal duty to Palazzolo under the Act should insulate Ryan from the consequences of breaching its agreement with Pan-Atlantic. One of the reasons why such a conclusion is fundamentally wrong is stated in *Larson, The Law of Workmen's Compensation*, Vol. 2, page 242:

> "* * * The question here becomes very precise: did the compensation acts, in conferring immunity on the employer from common law suits, mean to do so only at the expense of the injured employee, or also at the expense of outsiders? One answer is that the injured employee got *quid pro quo*, in receiving assured compensation payments as a substitute for tort recoveries, while the third party has received absolutely nothing, and hence should not be impliedly held to have given up rights which he had before. It is unfair to pull the third party within the principle of mutual sacrifice when his part is to be all sacrifice and no corresponding gain."

The petitioner attempts to integrate the separate and distinct obligations of (a) Ryan to Palazzolo in Compen-

sation, (b) Ryan to Pan-Atlantic in contract and (c) Pan-Atlantic to Palazzolo, by referring to "hydraheaded" litigation (Brief, 9) and the "conduit" theory (Brief, 20). Neither argument can withstand scrutiny.

The type of litigation characterized as "hydraheaded" is, indeed, common but in no sense is it peculiar to cases involving longshoremen, shipowners and stevedores. It is the aim of modern jurisprudence to abolish multiple trials where they are unnecessary. Rule 14(a) of the Federal Rules of Civil Procedure (printed in the Appendix) is one of general scope and is used in all types of litigation, including contracts and patent infringement. So, too, the 56th Admiralty Rule of this Court (printed in the Appendix) encompasses the whole field of admiralty litigation. In no way is it designed only for litigation between an injured longshoreman and shipowner on the one hand and the latter against stevedore on the other. The liberality of this more modern procedure, which the petitioner seems to frown upon, should be recognized for exactly what it is, namely, procedure and nothing more. Impleader can neither add to nor substract from the *substantive* legal rights of the parties. It is a judicial device to simplify the trial of issues and leaves unaffected the basic rights of the parties to the law suit. The petitioner has obscured the fundamental rights of shipowner and contracting stevedore by a purely adjective matter.

On the whole question, the fundamental issues can be most easily seen if one removes from consideration the procedure commonly referred to as "third-party practice." Let us assume that Palazzolo's action against Pan-Atlantic had not been removed from the New York State court and Pan-Atlantic did not bring Ryan into that litigation by using the practice allowed by Section 193(a) of the New York Civil Practice Act (printed in Appendix). Assume that the case was tried to a jury which found that Palazzolo was injured because the vessel was unseaworthy as

to her stow, the rolls not having been adequately chocked at Georgetown. Who stowed the cargo would be of no interest to Palazzolo or to Pan-Atlantic in that litigation, because the latter has a non-delegable duty to provide a longshoreman with a seaworthy vessel, *Seas Shipping Co. v. Sieracki*, 328 U.S. 85. Assume further that Palazzolo received a judgment for $75,000 in the State court and Pan-Atlantic paid the judgment. Thus there would be brought to final determination the rights which the injured longshoreman had against the shipowner. If the story ended there, Ryan could not even claim to be aggrieved. Indeed, it would be eminently satisfied with the result because it or its compensation carrier would receive from the judgment reimbursement for all sums it had paid as compensation to Palazzolo and all medical expenses incurred (33 U.S.C.A. 933).

The foregoing assumption explodes as utter nonsense the "conduit" theory which underlies so much of the petitioner's argument. Under those circumstances, no one could sensibly urge that Palazzolo had indirectly sued Ryan, his employer, or received anything directly or indirectly from Ryan. This conclusion cannot intelligently be otherwise simply because the story does not end at this point.

Let us assume that after Pan-Atlantic had satisfied Palazzolo's judgment, it then sued Ryan in a Federal court, there being diversity of citizenship, for breach of contract. That action would have nothing to do with Palazzolo, directly or indirectly. Already he would have had the full measure of his rights by the payment of the judgment. In the subsequent litigation between shipowner and stevedore nothing could happen to affect in any way either Palazzolo's rights to recover or the *quantum* of his damage. Once his judgment had been paid, the question of his rights against Ryan for compensation under the Longshoremen's and Harbor Worker's Compensation Act could

not arise, and, it is almost superfluous to point out that, in the first litigation by Palazzolo against Pan-Atlantic, any question of Palazzolo's compensation rights against Ryan would be entirely alien to the issues.

To continue the example, the cause of action for breach of contract would be tried, whether the theory of the complaint was express contract or implied contract. It would be resolved one way or the other in the Federal court litigation. If Pan-Atlantic prevailed and it was found that Ryan did breach its contract properly to stow the cargo, then, Pan-Atlantic would receive damages of $75,000 (and perhaps counsel fees and expenses as well) from Ryan for breaching that contract. Certainly no one could say that Palazzolo had ever sued Ryan directly or indirectly or had obtained any money from Ryan on the theory that Pan-Atlantic was some type of "conduit."

The foregoing example demonstrates the relative rights of the parties and no confusion can be created by any procedural question. All that the third-party practice did in this case was to result in one trial rather than two. While this practice was not required to be followed, it was obviously desirable because Palazzolo's claim against Pan-Atlantic on the one hand and Pan-Atlantic's claim against Ryan on the other had a common question of fact which should only be tried once, namely, was the stow at Georgetown proper and safe?

Looking to the general aspects of petitioner's Point I (Brief, 9-21) one would not suspect that the Court of Appeals for the Second Circuit had a concededly sound basis for decision, making academic any exploration into other fields to support the adjudication. While the Court found indemnification contract (as well as in "tort"—*but not a common tort against Palazzolo*) the petitioner says nothing of contract and has discussed extensively only the law of joint tort feasors.

The petitioner has recited (Brief, 13-16) the so-called "chronological judicial path" in the Second Circuit in the cases of *American Mutual Liability Insurance Co.* v. *Matthews*, 182 F. 2d 322, *Gill* v. *United States*, 184 F. 2d 49; *Slattery* v. *Marra Bros., Inc.*, 186 F. 2d 134; *LoBue* v. *United States*, 188 F. 2d 800 and *Mikkelsen* v. *The Granville*, 101 F. Supp. 566, 191 F. 2d 858. While they are largely unimportant here because of the contract features found by the Court of Appeals, these cases are not mysterious, do not create a "judicial morass" or result in a "welter of confusion."

It is the law of the Second Circuit that (a) if a stevedore-employer and the third-party are legally strangers, *i. e.*, there is no contractual or other recognized legal relation between them, (b) so that the *only* basis for contribution would be that accruing to joint tort feasors and (c) if the stevedore-employer has complied with 33 U.S.C.A. 901, *et seq.*, (d) the third-party may have neither contribution nor indemnity where the stevedore's employee has recovered from the third-party (e) because the stevedore's compliance with the Act makes him incapable of committing a tort against his employee and (f) the stevedore is legally unable to be a tort feasor. In that regard the *A.L.I. Restatement of Restitution* §86 (Brief, 15) is in accord. In short, if the *only* basis for contribution or indemnity under the facts of a given case is a *joint tort feasor* situation and one of the parties is not (and cannot be) a tort feasor, the relief is not granted.

What the petitioner overlooks is that in the very cases cited, the Court of Appeals fully recognizes the limitation of the doctrine as explained hereinbefore, and for a long time has been and is now citing with approval its own adjudications in *Burris* v. *American Chicle Co.*, 120 F. 2d 218 and *Rich* v. *United States*, 177 F. 2d 688; as well as *Westchester Lighting Co.* v. *Westchester Small Estates Corporation*, 278 N. Y. 175 and *United States* v. *Arrow Stevedoring*

Co., 175 F. 2d 329 (9th Cir.). The distinction is not lost in the Eastern or Southern District Courts in the Second Circuit usually. (Record, 31-33 and *Lundberg* v. *Prudential S. S. Corp.*, 102 F. Supp. 115.)

In the cited cases, these courts have recognized the fundamental distinction between two separate and distinct lines of obligation. One line of obligation runs from an employer to his employee, the other separate line of obligation runs from the employer (but not *as an employer*) to the person with whom he is bound by contract, express or implied, to do a good job. The *Westchester Lighting Company* case is interesting, not only because of the dignity and repute of the court which decided it, but, as well, because the New York Workmen's Compensation Law, which was there involved, is the very law upon which the United States Longshoremen's and Harbor Workers' Compensation Act was based.

In the *Westchester Lighting Company* case, the defendant set up in its answer to a claim for indemnity the fact the defendant had secured compensation to its employees, including the injured man who had previously recovered judgment against Westchester Lighting Co. The issue having been tendered to the Court of Appeals of New York by certification of the exact question, that court held that such a defense was no defense in law. The court referred to the provisions of Sections 10 and 11 of the New York Workmen's Compensation Law, which are substantially identical with the provisions of the United States Longshoremen's and Harbor Workers' Compensation Act. So far as the "exclusive liability" portions of the statutes are concerned, they are identical. The Court of Appeals of New York pointed out that the plaintiff's claim for indemnity was not "on account of the employee's death." The plaintiff was simply asserting its own right of recovery for *breach of an independent duty or obligation owed by the defendant to the plaintiff*. The court admitted that if the

defendant was required to respond in damages to the plaintiff, one might say, without analysis, that, in the end result, the employer had been made liable indirectly in an amount which could not have been recovered directly. The invalidity of that position was adjudged by the court because there are two different lines of legal obligation, namely, one running to the employee and the other running to the contractor. Accordingly, when the contractor sues, his action is not based upon any theory of subrogation. The court wrote:

> "An independent duty or obligation owed by the employer to the third-party is a sufficient basis for the action."

The foregoing brief discussion of the law of the Second Circuit and of the State of New York is not intended as a departure from the respondent's main theme under this Point (33 U.S.C.A. 901 *et seq.* has no effect upon respondent's implied contractual rights against Ryan) nor entry into the petitioner's enchanting phantasmagoria of "tort" or of "State law"[3] beyond the necessity of demonstrating the petitioner has resourcefully steered his vessel over turbulent seas, whipped up by created winds of gale force—and this where serene passage lies in the one word "contract."

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[3] At Brief, 21, footnote 6, the petitioner says that while it appreciates the meaning of the Act cannot depend upon what state courts may have held concerning their several and inharmonious compensation statutes, it has created the impression that nine of fourteen state courts have held compliance with their compensation laws to be a bar to a claim for indemnity and five states have not. This has been stated as rounding out "the reservoir of law on this subject." *Analysis shows that not a single case in any state cited by the petitioner has held against the respondent's rights here in implied contract.* Annexed hereto is an appendix discussing by states the case or cases to which the petitioner has referred as expounding the law of that state.

POINT II

No legislation is required to create indemnity, there being a fundamental difference between contribution and indemnity. Pan-Atlantic's claim against Ryan is not a maritime non-collision tort action.

Permeating the petitioner's brief is the thought that Pan-Atlantic's claim against Ryan is based upon a non-collision maritime tort (*e. g.*, Brief, 21, 23, 24, where such words appear as "maritime non-collision tort action," "substantive right in the maritime law," "implied in the maritime law"). When Pan-Atlantic's claim against Ryan is considered in its obvious contractual aspects, the claim may be expressed as one for breach of contract. There is nothing peculiarly maritime requiring the further development or application of admiralty concepts to such a claim.

It is true that the claim of Palazzolo against Pan-Atlantic was a maritime matter, but the event which gives rise to the indemnitor's obligation to the indemnitee is only of historical interest and does not transform an ordinary breach of contract action into one for a maritime tort. The distinction between the two situations has been extensively discussed hereinbefore. As to the alleged "maritime" aspects of Pan-Atlantic's contractual right of indemnity, this case does not differ in essence from one where the shipowner had been sued for cargo damage resulting from the improper stow by Ryan. The claim by cargo interests would be maritime in character. Having suffered damage by payment of the cargo claims, Pan-Atlantic's contractual rights against Ryan would be apparent and a suit to collect damages from Ryan under the contract would obviously not be to recover for a maritime tort. The nature of the cargo claim would not alter the contractual character of the claim for indemnity or translate rights in contract into the realm of tort. No principles

peculiar to maritime law would be involved in the contract action.[4]

The rules of law emerge from the cases with clarity only if it is recognized that there is a fundamental, basic difference between the legal concepts of contribution and indemnity. While they are both equitable doctrines, in some cases their legal bases are different. Contribution is an equitable rule which can be applied only where the rights of the parties are founded in tort, because contribution is a giving in common with others where all of the defendants owe a duty to the plaintiff. On the other hand, since indemnity is a making good or securing of another's loss, it may be bottomed either in tort or contract. The distinction is vital. *Larson, The Law of Workmen's Compensation*, Vol. 2, Sec. 76, pp. 227, 228. The rhetorical quotations by the petitioner, such as indemnity is "an extreme form of contribution," "full contribution," actually cannot support the petitioner's position that there is no difference in the two theories of contribution and indemnity, except a difference in the *quantum* of recovery. When a comparative is used as the major premise of a syllogism, peculiar conclusions of this type are common.

When it is considered that contribution can apply only between joint tort-feasors, the scope of *Halcyon Lines, et al.* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, is clear. In that case, a longshoreman had been injured by the concurrent, or joint, negligence of the shipowner and his stevedore employer. This Court pointed out that courts exercising a common law jurisdiction generally feel that they cannot create rights of contribution between joint tort-feasors simply on their own initiative. This Court held it had never been admiralty doctrine that there should be contribution between mutual wrongdoers, except in collision cases. In the *Halcyon* case, in effect, this

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[4] *Sacramento Navigation Company* v. *Salz*, 273 U. S. 326.

Court was asked to create a substantive right based upon a maritime tort. This Court refused, saying in substance that the remedy was to be found in the legislative field rather than in the judicial. There was nothing in the opinion dealing, directly or indirectly, with the contractual rights of indemnity between shipowner and stevedore. It might be urged that there is always a contractual arrangement between shipowner and stevedore. This is not factual, *e. g.*, cases where cargo is loaded or discharged by the shipper or consignee, or cases where a time charterer makes the arrangements with the stevedore, or cases where a voyage charterer makes such arrangements.

When one comes to a consideration of indemnity for breach of contract, it is clear the respondent is not seeking to have the judiciary create new rights which have not previously existed in the law. Such rights have been recognized by this Court as far back as *Washington Gas Light Co.* v. *District of Columbia*, 161 U.S. 316. There the Gaslight Company was under an obligation to maintain in good order a certain gas box imbedded in a sidewalk in the District of Columbia. The gas box was out of repair. One Parker stepped into it and was injured. Parker sued the District of Columbia on the theory that a municipal corporation is liable for damages sustained by an individual when caused by an obstruction or defect in a public thoroughfare. Parker had his recovery, and then the District of Columbia sued the Washington Gaslight Co. for indemnity, seeking therein to recover the full amount of the judgment which Parker had recovered against the District. This Court held that the District of Columbia did have a right of recovery on general and well-recognized common law principles. The Court did not then create any new rule of substantive law, as it was requested to do in *Halcyon Lines, et al.* v. *Haenn Ship Ceiling & Refitting Corp., supra*.

In discussing the fundamental legal principles existing well over 50 years ago, the Court said in the *Washington*

Gas Light Co. case, at pages 327, 328, that the common law right of indemnity being there applied was of general application and in no way was peculiar to municipal corporations. Previous to that time, this right of common law indemnity had been applied to cases involving public piers, the right of a property owner to recover damages which he had been compelled to pay for a defective wire attached by a company to the chimney of his house, to the right of a master to recover damages which he had been obliged to pay because of a servant's misconduct, and even at that comparatively early date this Court said: "Indeed, the cases which illustrate the rule and its application to many conditions of fact are too numerous for citation and are collected in the textbooks." Analysis of the factual situations to which this Court referred in the *Washington Gas Light* case demonstrates, beyond all question, that the common law right of indemnity then existing was based in some cases upon tort and in others upon breach of contract. The difference between indemnity and contribution is therein manifest.

The petitioner has inverted the obligations of shipowner and stevedore, urging that shipowners should go to Congress for relief whereas, in truth, if further Congressional action is desirable, it is the stevedore who should seek it. The petitioner is here endeavoring to remove stevedores from that liability in contract, express or implied, which all other contractors have. The respondent asks that existing law be applied to this case, while the petitioner is looking for an exception in favor of one particular class of persons. The petitioner does not even attempt to assign any reason, in justice or equity, why the stevedore should be in a preferred, or different, position from the contractors in cases such as *Burris* v. *American Chicle Company*, 120 F. 2d 218; and *Westchester Lighting Co.* v. *Westchester Small Estates Corporation*, 278 N. Y. 1[illegible].

The common law principle of indemnity which has heretofore been of general application, has nothing in its origins or development making it inequitable when applied to a stevedore. The core of the matter is discovered when one considers that the basis of indemnity in this case, or in any comparable case, is not any maritime tort at all. It is purely accidental and without legal significance that the cause which originally gave rise to the *indemnitee's* obligation to an injured person, is some event aboard a vessel, rather than an occurrence on a pier, or in a building, or on a public thoroughfare, or in a means of conveyance on land. The essence of the claim for indemnity is the breach of the obligation owed by the *indemnitor* to him who seeks the indemnity, and there is nothing peculiarly maritime or requiring the application of admiralty principles in that situation.

Far from there being any reason why the principles of indemnity should not apply to a stevedore, there is every reason to apply the rules of common law indemnity with undiminished vigor. Where a stevedore loads cargo improperly, (which is a direct breach of his undertaking, express or implied, to do a good job), he casts upon the shipowner absolute liability, whereby the injured person is not required to show any fault on the part of the shipowner. This Court said of unseaworthiness in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85:

> "It is essentially a species of liability without fault, analogous to other well-known instances in our law. Derived from and shaped to meet the hazards which performing the services impose, the liability is neither limited by conceptions of negligence nor contractual in character. * * * It is a form of absolute duty owing to all within the range of its humanitarian policy."

In a case such as the one at bar, the essential fairness of applying the general rule to a stevedore may be seen.

Where a stow of this character is created, the utmost diligence on the part of a shipowner would not, and could not, detect that the job was done improperly. As each roll was put in place, it automatically hid the manner of chocking of the roll behind it, and when the bottom layer was in place, no one in the world could tell how the rolls were chocked, or even if they were chocked. In any event, *as between shipowner and stevedore*; (not as between shipowner and injured person), it is difficult to see how the stevedore can fairly insist that the shipowner is required to use the utmost diligence to see that the stevedore does that good job for which the stevedore has been hired and paid.

On the question of general maritime law and the petitioner's views casting the indemnity rights into the admiralty field, this Court is not here called upon to vary or destroy the interpretation of the maritime statutes referred to in *Halcyon Lines, et al. v. Haenn Ship Ceiling & Refitting Corp., supra.* The Harter Act (46 U.S.C.A. §§ 190-195) governs the relationship between shipowner and cargo interests. The Limited Liability Act (46 U.S.C.A. § 181, *et. seq.*) relates to the shipowner's rights and obligations against the world under the circumstances therein stated. The Public Vessels Act (46 U.S.C.A. §§ 781-790) covers the obligations of the United States of America in the maritime field so far as it places the United States in the same position as private vessel owners and operators. The Jones Act (46 U.S.C.A. § 688) governs the employer-employee relation of shipowner or operator and crew. The U. S. Longsoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. 901, *et seq.*) controls the employer-employee relationship between stevedore and longshoreman. There is nothing in any of these statutes which purports, directly or indirectly, to have any effect upon the common law right of indemnity in favor of a shipowner against a stevedore, and the application of the rule of indemnity in no way upsets, or tends to vary, the integration of the

statutes. The administration of all of these Acts a an integral whole was not affected by this Court's adjudication that persons covered by the U.S. Longshoremen's and Harbor Workers' Compensation Act have a right against the shipowner for furnishing an unseaworthy vessel (*Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85; *Pope & Talbot, Inc.* v. *Hawn et al.*, 346 U.S. 406; and *Alaska Steamship Co. Inc.* v. *Petterson*, 347 U.S. 396). So, too, the rights of a shipowner vis-a-vis stevedore in common law indemnity can have no effect whatever upon the function of maritime laws as parts of one integral scheme. The rights of each affected class under the foregoing statutes remain as they were before.[5]

In similar vein, it is doubtful that the possible conflicting interests of various groups, to which this Court referred in the *Waterman Lines* case, exist here. It is highly questionable that stevedores, as a group, desire this Court to alter the existing rule of law concerning indemnity. The question is usually resolved by contract between shipowner and stevedore, and it is implicit in what the petitioner has written that it is commonly the practice of the stevedore specifically to undertake indemnity by express contract provision. It is only in the odd case, where shipowner and stevedore are not dealing at arm's length, that the problem must be resolved by implied, rather than express, contract. No reason is assigned why an exception to the general rule of commercial practice should be carved out by this Court under such circumstances.

In order to give the case peculiarly maritime flavor,[5] the petitioner has urged (Brief, 22-23) that if this right of indemnity were presented to an admiralty court, it might not have jurisdiction. There are five answers to the argu-

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[5] Of course, the stevedoring contract is maritime in character but there is nothing unique in the law relating to implied contracts in the maritime law. See, *Sacramento Navigation Company* v. *Salz*, 273 U. S. 326, 329.

ment: First, this claim was presented at law, not in admiralty; second, indemnity is not exclusively a quasi-contractual right; third, the forum in which rights may be asserted in no way alters substantive law (*Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406). Also, for example, prior to 1948, when 46 U.S.C.A. 740 was enacted, the admiralty courts had no jurisdiction of a pier owner's claim based on damage negligently caused by a vessel; but this had no effect on the substantive rights of the pier owner who could proceed at law (*Turner Terminal Company* v. *U.S.*, 93 F. Supp. 441). Fourth, *Robinson* on *Admiralty*, 1939 *Edition*, page 197, *et seq.*, which the petitioner cites to support its conjecture, actually demonstrates the likelihood of admiralty jurisdiction. Of *Krauss Bros. Lumber Co.* v. *Dimon S. S. Corp.*, 290 U.S. 117, the author has said, "The opinion is concerned largely with the lien point. But it seems necessarily to hold that the quasi-contract claim on which the lien rested was itself within the admiralty jurisdiction." Fifth, this Court held there is jurisdiction in an admiralty court. *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446.

Finally, in Point II (Brief, 23), the petitioner returns to its principal theme in Point I and repeats the argument that a stevedore who has complied with the U.S. Longshoremen's and Harbor Workers' Compensation Act cannot be subject to a tort claim by his employee. Whether the effect of the Act is to destroy the substantive possibility of tort, or is to abolish the remedy, need not be decided. Suffice it to say, that the tort issue urged by the petitioner under this Point is just as inapposite as under Point I. Again, the respondent points to the contractual relationship between Pan-Atlantic and Ryan, upon the basis of which the Court of Appeals for the Second Circuit has rightly adjudged the cause.

POINT III

The United States Court of Appeals did not make findings of fact different from the Trial Court.

While the writ of certiorari in this case has not been limited by the Court to a consideration of any particular problem presented in the petition, counsel for the respondent have doubted the writ was issued to review the evidence (see Opinion of Mr. Justice Frankfurter in *McAllister v. United States of America*, U.S. ; 75 S. Ct. 6). However, the petitioner has urged (Brief, 25-32) that there were some serious disputes of fact at the trial and has quoted various parts of the testimony. Accordingly, it is deemed necessary for the respondent generally to review the trial and, particularly, the Trial Court's charge to the jury, in order that the bases upon which the Court of Appeals for the Second Circuit reversed on the law and not the facts may be apparent.

When all of the pleadings, interrogatories, motions, testimony at the trial, Judge's charge—in short, when the whole record is studied—it is seen that the matter between Palazzolo and Pan-Atlantic was reduced to an issue simply stated. The one and only basic fact issue in the case was the propriety of the cargo stow at Georgetown. There never was any dispute of any fact between Pan-Atlantic and Ryan. The sole contest at the trial was between Pan-Atlantic and Palazzolo on this question of whether the stow was proper. If the jury found the stow to be good, Palazzolo's case would have fallen. The jury's verdict for Palazzolo established that the stow was not proper. Ryan has admitted throughout that it had, in fact, created the stow, and consequently, the ultimate issue between Pan-Atlantic and Ryan for decision by the Trial Judge was one of law, namely: Under the facts as established was Pan-Atlantic entitled to indemnity from Ryan.

In arriving at his conclusion, the Trial Judge failed to appreciate the impact of his charge to the jury. This

charge was permeated with the concept of unseaworthiness. The idea of unseaworthiness, as expressed by the Trial Court, was so interwoven with the idea of negligence that the two concepts were inseparable (Record, 290, 291, 292). Because unseaworthiness is a type of liability without fault (*Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85), and negligence is synonymous with fault, it is frequently difficult for one to attempt a unitary concept of the two inconsistent theories. On occasions the difference between them may be vital, *e. g.*, *Mahnick* v. *Southern S. S. Co.*, 321 U.S. 96. But it frequently happens, and such is the case at bar, that the same facts may result in a holding of both negligence and unseaworthiness. No one could challenge the conclusion that if the stowage of the cargo at Georgetown was improper, then automatically the vessel was unseaworthy as to her stow. Having intermingled these two theories of negligence and unseaworthiness in charging the jury, the Trial Judge changed the rules when it came time for him to decide the separate rights of Pan-Atlantic against Ryan and meticulously separated the two theories. He reached the legal conclusion that the parties were joint tort-feasors, *overlooking completely the contract between Pan-Atlantic and Ryan.* He did not seem to understand that Ryan was not charged in the case with having committed any tort against Palazzolo. The Trial Judge did misconceive, misinterpret, and in his opinion did misstate, the legal position taken by Pan-Atlantic. With the facts established beyond all question, the Court of Appeals corrected the legal error committed by the Trial Court. *Spaulding* v. *Parry Navigation Co.*, 187 F. 2d 257, cert. den. 342 U. S. 918; *Kell* v. *Gross*, 171 F. 2d 715, cert. den. 338 U.S. 815.

The Court of Appeals found support for Pan-Atlantic's right of indemnity on two separate bases. One base might be called indemnity arising out of tort, and the other indemnity arising out of contract. When the Court said, "We think the improper stowage the primary and active

cause of the accident", it made no new finding or inference of causation different from the Trial Court. It was the *only* ground of recovery asserted by Palazzolo, and the only basis upon which his claim could possibly have been supported. The words "sole", "active", "primary", "secondary", need cause no concern here, since one of the bases supporting the decision of the Court of Appeals is so unimpeachable that the petitioner has never discussed it. There is not a word in the petitioner's brief concerning two sentences in the Opinion of the Court of Appeals (Record, 327) which rendered really moot all questions of tort, tort feasors, etc. These were:

> "Ryan was obligated by implied contract to perform the work in a reasonably safe manner. This duty Ryan breached; accordingly, Pan-Atlantic is entitled to indemnity."

Therein is the key to the arch. When one considers the contractual phases of the case, the petitioner's fundamental position falls.

Since it must—the evidence being uncontradicted—Ryan admits:

1. It had a contract with Pan-Atlantic properly to stow the cargo at Georgetown.
2. It did not perform its work under the contract in a reasonably proper manner;
3. Palazzolo was hurt because of the improper stowage of the cargo;
4. Pan-Atlantic has been compelled to pay $75,000 to Palazzolo.

In short, Ryan admits it breached its contract and takes the unconscionable position that, despite such fact, it is

not liable for breach of its contract and Pan-Atlantic can have no recovery because of some theories governing the law of torts.

Ryan's position here is not only untenable because it misconceives the nature of Pan-Atlantic's claim (for example, at Brief, 32, reference is made to "a personal injury action"), but also because it is opposed to the public interest. The solicitude of this Court for the welfare of maritime workers is traditional. The decision of the Court of Appeals in this case has placed the ultimate responsibility on the stevedore, who is best situated as a matter of fact to remedy the conditions which caused Palazzolo's injury, and which often cause injury to other longshoremen. If Ryan had done that good job which it was hired and paid to do, this case never would have arisen.

It is certainly the desire of the whole judiciary that the conditions under which longshoremen perform their hazardous work should be as safe as can humanly be achieved. The stevedore controls the conditions under which his longshoremen work. Stevedores are specialists and theirs is the opportunity to say whether conditions are reasonably safe or not; whether their men should work under the circumstances, or what additional safeguards may be required, so that their longshoremen may perform their tasks in reasonable safety. Because the stevedore is a specialist in the loading and discharging of cargo, this type of work is done by stevedoring companies, rather than by the ship's personnel. It is an enlightened policy, which imposes upon the stevedore the ultimate responsibility for doing a poor job, because it is the stevedore's primary right, privilege and opportunity to correct those conditions which lead to the injury of workmen. When companies of this type finally conclude that the law is meaningful when it places the primary obligation on the stevedore to furnish the men with a safe place to work, then the "hands-off" attitude of the petitioner, and others

similarly situated, will disappear. It is a reasonable conclusion therefrom that accidents of this character will diminish in frequency.

Underlying the entire discussion in petitioner's brief, Point III, is the thought that a stevedore has no obligation of any kind to see to it that longshoremen work in conditions of safety. It really urges that the burden is on the shipowner to see that the stevedore, who has been hired to do a good job, must, at the shipowner's peril, use great diligence to see that the stevedore does the good work for which it has been hired and paid. As a corollary of that fallacious premise is the thought that Ryan was only a bystander, totally aloof to a point where one must question how the cargo ever did become stowed, and, at Brief, 32, Ryan endeavors to support the role of innocent bystander by urging that Pan-Atlantic furnished defective or improper gear to Ryan. The only, and undisputed, proof in the Record is exactly the opposite, namely, there were proper chocks both aboard the vessel and on the dock at Georgetown, where the cargo was lifted (Record, 236). The Court of Appeals for the Second Circuit was not misled by the innocent role which the petitioner has assumed.

For the reasons indicated previously, and particularly because of the contractual phases of this case, the decision of this Court in *McAllister* v. *United States of America* (U.S. ; 72 S. Ct. 6), referred to at page 32 of the petitioner's brief, is not apposite. In that case, an admiralty judge had concluded on the basis of the facts and the opinion of experts, that there was a connection between the respondent's negligence and the libelant's contracting polio. The Court of Appeals felt no proximate cause had been shown and that the matter was purely conjectural. This Court held that upon the balance of the probabilities it did seem a reasonable inference for the Judge to have drawn that there was a causal connection, and therefore

one could not properly say that the inference of causation was clearly erroneous.

When one looks at the case at bar, through the eyes of contract, all questions of inference, causation, and the quality of tortious conduct disappear.

CONCLUSION

The judgment in the court below being in accord with existing law and having achieved justice between the parties, should be affirmed.

Respectfully submitted,

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APPENDIX

Consideration of State Workmen's Compensation Statutes referred to in Appendix to petitioner's brief.

CALIFORNIA: The petitioner admits that the interpretation of Sec. 3601 of the Labor Code of California in *Baugh* v. *Rogers*, 24 Calif. 2d 200, is opposed to its position here.

COLORADO: *Ward* v. *Denver & R.G.W.R. Co.*, 119 F. Supp. 112.

This Federal Court recognized that there were no adjudications in the Colorado state courts interpreting Sec. 292 of Chapter 97 of the Colorado Statutes Annotated. The court felt that the Colorado Statute was broader in scope than the State Statutes of North Carolina and New Jersey which seemed to immunize the employer. There was nothing in the relationship between the third-party defendant and the original defendant which would support a breach of contract theory.

IOWA: The petitioner admits that *American District Telegraph Co.* v. *Kittleson*, 179 F. 2d 946, interpreting Sec. 85.20 of the Iowa Code Annotated, is opposed to the petitioner's position.

MARYLAND: *Baltimore Transit Co.* v. *State, to Use of Schriefer, et al.*, 183 Md. 674, 39 Atl. 2d 858.

Schriefer, an employee of the City of Baltimore, was killed in the course of his employment and the city made payment of compensation to Schriefer's dependents under an award of the State Industrial Action Commission. At the time of the accident, Schriefer, an employee of the street cleaning department, was riding on a truck owned by one Bauernfeind and operated by her chauffeur, one Bivens, under contract with the city to collect ashes. The

truck was struck by a street car owned by the transit company. Using rights of subrogation, the State sued the transit company and Bauernfeind. The transit company procured an order making the city a third-party defendant. The theory of the third-party claim was that the accident was due solely to the negligence of the city's agent and liability was claimed under the Joint Tort Feasors' Act of Maryland. The court held that the right of contribution is a derivative right and is only applicable under Maryland law "where there is a common liability to an injured person in tort." The court found further difficulty in the Uniform Contribution Act because of procedural difficulties "due to the lack of a comprehensive third-party practice act." Obviously, the only relation among the defendants was that of tort feasors, there being no contractual undertaking between or among them.

MINNESOTA: The petitioner admits that *Lunderberg* v. *Bierman*, 63 N.W. 2d, 355, interpreting Sec. 176.031 of Minnesota Statutes Annotated, is opposed to the petitioner's position.

NEW JERSEY: *Slattery* v. *Marra Bros., Inc.*, 186 F. 2d 134.

In this case, a Federal Court referred to Section 34:15-8 of the New Jersey Statutes Annotated. Marra Bros., Inc. was the lessee of the pier on which the plaintiff, an employee of Spencer, was injured. Spencer had procured compensation for its employees and the question was whether Marra might have indemnity from Spencer. The Court said, "However, in the case at bar, not only was the Spencer Co. not liable to Slattery, but it had no contract with Marra Bros., Inc. or any other legal relation with it except that of joint tort feasor." The Court recognized that the right of indemnity could come from contract, as in *Burris* v. *American Chicle Co.*, 120 F. 2d 218 and *Rich* v.

United States, 177 F. 2d 688, or tort, as in *Westchester Lighting Co.* v. *Westchester Small Estates Corp.*, 278 N. Y. 175.

NEW YORK: The petitioner admits that *Westchester Lighting Co.* v. *Westchester County Small Estates Corporation*, 278 N. Y. 175, interpreting Sec. 11 of the New York Workmen's Compensation Law is opposed to the petitioner's position.

NORTH CAROLINA: *Brown* v. *Southern Ry. Co.*, 202 No. *Carolina* 256, 162 S. E. 613.

The case stands for the proposition that under the Workmen's Compensation Act of North Carolina, there can be no contribution among joint tort feasors where one of the alleged tort feasors is an employer who has procured compensation and there is no contractual relationship between the alleged tort feasors.

Hoover v. *Globe Indemnity Co.*, 202 No. Carolina 655, 163 S. E. 758.

A man, being injured in the course of his employment, died as the result of alleged malpractice. The court held that malpractice is not an independent ground for action under North Carolina laws, falls within the scope of the Workmen's Compensation Law and, therefore, the employee and his representative can only proceed under compensation law.

Essick v. *City of Lexington*, 232 No. Carolina 200, 60 S. E. 2d 106.

It was admitted that the defendants who brought in the additional defendants had no right under North Carolina law to obtain contribution as joint tort feasors. The court

referred to the law permitting a party sued in negligence to plead in partial bar of recovery, the negligence of the employer in producing the injury.

Lovette v. *Lloyd*, 236 No. Carolina 663, 73 S. E. 2d 886.

It does not appear that there was any contractual relationship between the original defendant and the third-party defendants but, in any event, the provisions of the Workmen's Compensation Act of North Carolina are entirely too different to be compared. Indeed, under that law, where an employee is injured by the negligence of a third-party and his employer, the third-party may plead and prove the concurring negligence of the employer as a bar, *pro tanto*, to the recovery of the compensation paid or payable by the employer.

Hunsucker v. *High Point Bending & Chair Co.*, 237 No. Carolina 559, 75 S. E. 2d 768.

This opinion points up the very distinctions urged by the respondent in the case at bar. In the first place, the court did find that the total of North Carolina statutes was not entirely harsh on a third party, in that, his liability to an injured employee was reduced to the extent of workmen's compensation received. It said, "Much confusion is avoided if constant heed is paid to the significant and simple circumstances that the employer, *i. e.*, Herman-Sipe, had no contract with the appellant or any other legal relation with it except that of joint tort feasor." The court fully understood that where a third party has an independent right to call upon the employer for indemnity because of contract, such indemnity may be had regardless of compensation laws. The court discussed extensively the cases of *Westchester Lighting Co.* v. *Westchester County Small Estates Corporation*, 278 N. Y. 175; *Burris* v. *American Chicle Co.*, 120 F. 2d 218; *McFall* v. *Compagnie Maritime*

Belge, 304 N. Y. 314, and *Rich* v. *United States*, 177 F. 2d 688. Of them, the Court wrote:

> "He was required to indemnify the third party for damages paid to an injured employee because he had breached his independent contractual duty to the third party to perform the work with due care."

OHIO: In *Bankers Indemnity Insurance Company* v. *Cleveland Hardware & Forging Co.*, 77 Ohio App. 121, 62 N. E. 2d 180, the entire decision was based upon factors other than contractual matters. In that case, the plaintiff insured Burdett Oxygen Company against loss through negligence. The defendant, Cleveland Hardware, claimed it ordered nitrogen gas from Burdett, but Burdett delivered oxygen instead and an explosion occurred, killing three of Cleveland Hardware's employees. Cleveland Hardware paid compensation to the dependents of its deceased employees, and after these dependents sued Burdett Oxygen, claiming negligence in delivery of the gas. The plaintiff insurance carrier of Burdett concluded that the primary fault was that of Burdett and any negligence of Cleveland Hardware was secondary. The Insurance Company compromised the action and then sued for the full amount it had thus paid.

The plaintiff did not plead any theory that the Hardware Company was primarily liable and the Oxygen Company secondarily liable. The Court recognized that where there is primary and secondary liability the wrongdoers are not joint tort feasors and the one secondarily liable may recoup his loss "from the one who actually created the danger." As to the compensation phases of the case, the Court said that the Ohio constitutional provisions are entirely different from those in the New York Compensation Law (upon which the U. S. Longshoremen's and Harbor Workers' Compensation Law was based) and that

under the Ohio Constitution an employer complying is relieved from "all common law liability."

OKLAHOMA:- In *Peak Drilling Co.* v. *Halliburton Oil Well Cement Co.*, 215 F. 2d 368, the Federal Court could find nothing in the state courts of Oklahoma dealing with Section 12 of Title 85 of Oklahoma Statutes Annotated. There was no contractual relationship between the defendant and the third-party defendant, and under Oklahoma law there is no right of contribution or indemnity where the parties are joint tort feasors. The original defendant alleged a contract implied by law as grounds for indemnity "but the pleadings do not allege an independent legal relationship from which a contract can be implied. Indeed, they do not create any legal relationship from which a duty arises from Halliburton to Peak. Both Peak and Halliburton were independent contractors to Sinclair there was no contractual relationship between them. Of course, each owed the other the duty to exercise ordinary care, but there is no allegation of a breach of that duty and there is therefore no legal basis for indemnity." The court was definite in its views that it was not placing itself as opposed to *Burris* v. *American Chicle Co.*, 120 F. 2d 218; *Westchester Lighting Co.* v. *Westchester County Small Estate Corporation*, 278 N. Y. 175, or *Rich* v. *United States*; 177 F. 2d 688, pointing out again that there was no contractual or legal relationship between the parties before the court giving rise to an enforceable duty which would sustain the right of indemnity against the employer as found in the cited cases.

PENNSYLVANIA: *Maio* v. *Fahs*, 339 Pa. 180, 14 Atl. 2d 105.

As the petitioner recognizes, the Pennsylvania law is quite different from 33 U.S.C.A. 901, *et seq:* but the adjudication actually is of no help to the petitioner. While the

plaintiff's husband, one Sell, was employed as a helper on a milk truck operated by Turner, the vehicle came in collision with the tractor operated by Fahs and was killed. The plaintiff sued Fahs to recover for wrongful death and the latter brought in Turner and the driver of the truck, Chatburn. The plaintiff had a judgment jointly against all defendants. The court agreed there was evidence to justify a finding of fault on the part of both drivers. Turner urged that the plaintiff's exclusive rights against it were under the Pennsylvania Workmen's Compensation Act of June 2, 1915, P. L. 736, 77 P. S. Par. 1, *et seq.* The court held that the Act of June 24, 1939, P. L. 1075 permitted contribution among those jointly or severally liable for a tort where their liabilities are all primary or are all secondary. The court held that if the defendants, other than Turner, the employer, paid the judgment, they did have a right to receive contribution from Turner to the extent of his liability under the compensation law. Additionally, if the plaintiff received anything in compensation from Turner, such amount would be deducted from the amount which the other defendants would be required to pay the plaintiff.

Rhode Island: The petitioner admits that *Whitmarsh* v. *Durastone Co.*, 122 F. Supp. 806, interpreting Chapter 300, Art. 1, Sec. 6 of the Rhode Island General Laws, is opposed to the petitioner's position.

South Carolina: In *Burns* v. *Carolina Power & Light Co.*, 88 F. Supp. 769, aff'd 193 F. 2d 525, the Federal Court agreed that there are no decisions of the state courts in South Carolina adjudging the effect of Sec. 72-401 of the Code of Laws of South Carolina, 1952. Further, the Federal Court's opinion on this subject was admittedly *obiter dictum*, for its discussion began with the words,

"If it were necessary to decide definitely the law of South Carolina regarding these matters * * *." Actually, the court held that, under the allegations of both the original and the third-party complaints, the original defendant and the third-party defendant could be nothing but joint tort feasors. There was no contractual arrangement, express or implied, between the parties.

WISCONSIN: *Britt* v. *Wolff*, 201 Wis. 533, 230 N. W. 621.

Britt was a passenger in a car driven by Buggs. It was in collision with a car driven by Wolff. Britt being an employee of Buggs, the latter assigned any claim which he might have to Britt against Wolff. Britt sued Wolff for damages. Wolff filed a cross-complaint against Buggs alleging that Buggs had been equally guilty of negligence. This case stands for the proposition that, where two strangers have jointly injured a person, there may be no contribution between the tort feasors where one of them has been an employee of the plaintiff and has procured the payment of compensation.

In *Guse* v. *A. O. Smith Corp.*, 260 Wis. 403, 51 N. W. 2d 24, the section of the Wisconsin law involved had nothing to do with anything like 33 U.S.C.A. 905. The plaintiff's wife had been injured in the course of her employment and had received workmen's compensation provided in Chapter 102 of the Wisconsin statutes. Her husband sued for loss of consortium. The court specifically recognized that the Wisconsin statute is entirely different from 33 U.S.C.A. 901, *et seq.* so that anything it wrote would be inapposite. The court recognized that there is a great conflict of state decisions on the question of whether a husband or a wife can maintain an action against an employer for loss of consortium as a result of the injury.

Rule 14(a) of the Federal Rules of Civil Procedure is as follows:

"When defendant may bring in third party. Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counter claims and cross-claims as provided in Rule 13. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant."

The 56th Admiralty Rule of the Admiralty Rules of Practice of this Court provides as follows:

"56. Right to bring in party jointly liable.—In any suit, whether in rem or in personam, the claimant or respondent (as the case may be) shall be entitled to bring in any other vessel or person (individual or corporation) who may be partly or wholly liable either to the libellant or to such claimant or respondent by way of remedy over, contribution or otherwise, growing out of the same matter. This shall be done by petition, on oath, presented before or at the time of answering the libel, or at any later time during the progress of the cause that the court may allow. Such petition shall contain suitable allegations showing such liability, and the particulars thereof, and that such other vessel, or person ought to be proceeded against in the same suit for such damage, and shall pray that process be issued against such vessel or person to that end. Thereupon such process shall issue, and if duly served, such suit shall proceed as if such vessel or person had been originally proceeded against; the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain. But every such petitioner shall, upon filing his petition, give a stipulation, with sufficient sureties, or an approved corporate surety, to pay the libellant and to any claimant or any new party brought in by virtue of such process, all such costs, damages, and expenses as shall be awarded against the petitioner by the court on the final decree, whether rendered in the original or appellate court; and any such claimant or new party shall give the

same bonds or stipulations which are required in the like cases from parties brought in under process issued on the prayer of a libellant."

Section 193(a) of the New York Civil Practice Act provides as follows:

"§ 193-a. Third-party practice. 1. After the service of his answer, a defendant may bring in a person not a party to the action, who is or may be liable to him for all or part of the plaintiff's claim against him, by serving as a third-party plaintiff upon such person a summons and copy of a verified complaint. The claim against such person, hereinafter called the third-party defendant, must be related to the main action by a question of law or fact common to both controversies, but need not rest upon the same cause of action or the same ground as the claim asserted against the third-party plaintiff.

2. The third-party defendant may answer the claim asserted against him and serve copies of his answer upon the third-party plaintiff's attorney and the plaintiff's attorney within twenty days after the service of the summons and copy of the third-party complaint, so that the claims of all parties may be determined in the action, which shall proceed to such judgment or judgments as may be proper. In his answer the third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. For the purpose of contesting plaintiff's claim against the third-party plaintiff, the third-party defendant shall have the rights of a party adverse to the plaintiff, including the right to appeal.

* * * * *"

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No. 4

In the Supreme Court of the United States

OCTOBER TERM, 1954

RYAN STEVEDORING CO., INC., PETITIONER

v.

PAN-ATLANTIC STEAMSHIP CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 157

RYAN STEVEDORING CO., INC., PETITIONER

v.

PAN-ATLANTIC STEAMSHIP CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of New York (R. 316–319) is reported at 111 F. Supp. 505. The opinion of the United States Court of Appeals for the Second Circuit (R. 324–328) is reported at 211 F. 2d 277.

JURISDICTION

The judgment of the Court of Appeals was entered on March 25, 1954 (R. 327). The petition for a writ of certiorari was filed on June 21, 1954, and granted on October 14, 1954 (R.

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329, 348 U. S. 813). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a ship which has been held liable to a longshoreman for injuries suffered in an accident caused by the contracting stevedore's breach of its contractual duty to the ship to stow the ship's cargo safely is entitled to be indemnified by the stevedore for the damages so assessed.

2. If so, whether the exclusive liability provision of Section 5 of the Longshoremen's and Harbor Workers' Act impairs the ship's remedy for the breach of this independent contractual duty owed by the employer (the stevedore), not to the longshoreman, but to a third party (the ship).

STATUTES INVOLVED

Section 5 of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424, 1426, 33 U. S. C. 905) provides:

> SEC. 5. The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin and any one otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of

compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

Section 33 of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1440, 33 U. S. C. 933), as amended by the Act of June 25, 1938, Secs. 12 and 13 (52 Stat. 1168) and Reorganization Plans No. 2 of 1946 (60 Stat. 1095) and No. 19 of 1950 (64 Stat. 1271), provides:

SEC. 33. (a) If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the Secretary may provide, to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all

right of the person entitled to compensation to recover damages against such third person.

(c) The payment of such compensation into the fund established in section 44 shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person, whether or not the representative has notified the deputy commissioner of his election.

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner);

(B) the cost of all benefits actually furnished by him to the employee under section 7;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accord-

ance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 7, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(f) If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the Secretary of his election and institutes proceedings within the period prescribed in section 13, the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

(g) If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this Act, the employer shall be liable for compensation as determined

in subdivision (e) only if such compromise is made with his written approval.

(h) The deputy commissioner may, if the person entitled to compensation under this Act is a minor, make any election required under subdivision (a), or may authorize the parent or guardian of the minor to make such election.

(i) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

STATEMENT

In 1949, the S. S. *Canton Victory*, operated by the respondent, Pan-Atlantic S. S. Corp. (referred to in this brief as Pan-Atlantic or the ship), under a bareboat charter (R. 8, 9), was engaged in the coastwise cargo trade between the Atlantic and Gulf ports (R. 213). The petitioner, Ryan Stevedoring Company, Inc. (referred to as Ryan, the stevedore, or the stevedoring company), was under contract to perform all stevedoring services on Pan-Atlantic's vessels (R. 26–31).[1]

In July 1949, the *Canton Victory* loaded a cargo of pulp board at Georgetown, South Carolina, for discharge at New York (R. 216). Pulp

[1] Respondent's opposition to the petition for certiorari discloses that petitioner and respondent are both wholly owned subsidiaries of Waterman S. S. Corporation (Respondent's Brief in Opposition, p. 3).

board is used to make corrugated paper and bags (R. 213). It comes in rolls of uniform diameter of about four feet, their length varying from three to five feet depending on the customers' needs (R. 239–240). The method of stowage used in the instant case, the chine or nesting method, consists of placing one layer of rolls horizontally on the floor, a second layer is nested in the troughs between the rolls of the bottom layer, a third layer may be placed on top of this one (R. 188, 191; cf. Def. Exh. D, R. 312A). In order to immobilize the bottom layer it is necessary to secure or "chock" it either with wedges, or with planks (dunnage) at least four inches high (R. 233–234).

In the instant case Ryan loaded the pulp rolls at Georgetown, South Carolina, and unloaded them at Brooklyn, New York (R. 37, 216). When the *Canton Victory* docked at Brooklyn, one Palazzolo was employed by Ryan as a longshoreman to unload the after end of Hatch No. 3, in which the pulp was stowed (R. 50). Another gang, working in the forward end of the same hatch, disturbed a tier of rolls, as the result of which one of them, weighing about 3,200 pounds (R. 118), worked itself free and struck Palazzolo, crushing his left leg (R. 90–91, 111–112, 134–135).

Ryan did not contest its liability under the Longshoremen's and Harbor Workers' Compensation Act; it voluntarily paid to Palazzolo $2,940 compensation and furnished him with medical

services worth $9,837 (R. 306); it did not require the making of a formal award by the Deputy Commissioner.

Palazzolo, however, availing himself of his rights under Section 33 of the Longshoremen's and Harbor Workers' Compensation Act (*supra*, pp. 3–6), elected to bring suit against Par-Atlantic as the owner of the *Canton Victory* on the ground that the accident had been caused by improper stowage, for which the ship was responsible either on a theory of negligence or of unseaworthiness (Complaint, pars. 5 and 6, R. 8). The ship impleaded Ryan on the ground that if the cargo had been stowed improperly it was Ryan's fault and, since the latter had contracted to load the cargo in a skillful manner, it had to hold the ship harmless from any liability resulting from its violation of its contractual duty (R. 10–13), even in the conceded absence of an express provision for indemnity (R. 316).

A motion for summary judgment dismissing the third-party complaint (R. 21–31) was denied on the ground that there were issues of fact which could be determined only after a trial (R. 31–33).

The trial was held pursuant to a stipulation under which the issues between the plaintiff longshoreman and the ship were to be submitted to a jury, while the issues of fact and law raised by the third-party complaint between the ship and the stevedore were to be determined by the court alone (R. 46–47, 317–318).

The principal factual issue in the main action between the stevedore and the ship was the question of whether the pulp rolls in Hold No. 3 had been secured with wedges, or only with pieces of lumber less than an inch in height (scrap dunnage). The ship's second mate testified that he had generally overseen the loading process at Georgetown, but that he could not watch the stowing of every roll (R. 214, 234–235, 245). In the course of his general supervision of the loading he noticed that the employees of the stevedore were using wedges (R. 251–252, 318). He did not know of a single instance in which the rolls were secured only with scrap dunnage (R. 236, 240, 318); indeed, if he had observed that this had been done, he would have complained to Ryan (R. 251, 260–261, 318). Witnesses for both sides agreed that, once the bottom layer of pulp rolls was put in place, it was impossible to see from above whether it was secured with wedges or scrap dunnage (R. 77, 237).

The plaintiff longshoreman, on the other hand, introduced a substantial amount of evidence to the effect that the rolls had not been secured with wedges, but merely with scrap dunnage about ¾″ thick (see, *e. g.*, R. 66, 94, 127, 276, 318–319). It also appeared that during the unloading of the *Canton Victory* at Brooklyn, Ryan's hatch foreman noticed that the pulp rolls were secured with ¾″ thick dunnage rather than with wedges (R. 276–277), and that, in view of the dangers facing

the unloading longshoremen from this method of stowage, he ordered his crew to find some 4 x 4 or 6 x 6 pieces of lumber in order to fasten the rolls (R. 278–280, 286) but that he did not stop the unloading until such pieces could be found (R. 286).

In the action between the longshoreman and the ship the jury found in favor of the plaintiff in the amount of $75,000 (R. 304) and judgment was entered accordingly (R. 315). The court ordered that out of this judgment the sum of $12,797.36, representing compensation payments of $2,940 and $9,857.36 for medical services furnished to the plaintiff, be first paid to the stevedore's compensation carrier (R. 319–320).

On the other hand, the District Court dismissed the third-party complaint brought by the ship against Ryan. It found that there was sufficient evidence in the record to base the ship's liability to the longshoremen not merely on a breach of its warranty of seaworthiness, "a species of liability without fault" (*Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 94), but also on the ship's negligent failure to discover the dangerous condition of the cargo. (R. 317–319.) The court concluded that this element of negligence rendered the ship and the stevedore joint tortfeasors and defeated the former's right to recover indemnity (R. 319).

The Court of Appeals reversed. It agreed with the District Court that "there was ample evi-

dence to support a jury verdict on either or both negligence or unseaworthiness" (R. 326). It held, however, that the stevedore was obligated by contract to perform the stowage of the pulp rolls in a reasonably safe manner, that it breached this duty when it created the hazardous condition on the *Canton Victory* by the improper stowage, and that respondent's negligence consisted merely in its failure to supervise properly the task undertaken by petitioner (R. 326). In these circumstances the Court of Appeals held that respondent was entitled to indemnity. Neither court discussed the question of the impact, if any, of Section 5 of the Longshoremen's and Harbor Workers' Compensation Act upon the ship's right to indemnity.

INTEREST OF THE UNITED STATES

The United States, as the world's largest shipowner, and therefore one of the largest employers of stevedore-contractors, is deeply concerned with the frequently recurring question raised by this cause, *viz.*, whether a ship which has become liable to a longshoreman as a result of a dangerous condition brought about by his employer's failure properly to perform its contract remains saddled with the loss or whether it can obtain reimbursement from the stevedore whose breach of contract actually caused the injury. Since the United States acts as a self-insurer with respect to many of its vessels, it has an important financial stake

in the resolution of this legal problem. And its interest is far greater than that of most of the litigants in this type of case where, as in the usual instance, a large part of the liability is covered by insurance,[2] or where, as here, the parties are subsidiaries of the same parent corporation, or where both parties might even be insured by the same underwriter as in *Alaska S. S. Co.* v. *Petterson,* 347 U. S. 396.

SUMMARY OF ARGUMENT

A longshoreman was injured during the unloading of a vessel. He successfully sued the ship and recovered on the grounds that the ship had been unseaworthy and that the ship's officers had been negligent in failing to discover this condition. In the instant proceeding the ship seeks reimbursement from the stevedoring company on the theory that it had been hired to load and unload the ship in a skillful manner; that the creation of the dangerous condition, which resulted in the injury to the longshoreman and the ship's liability to him, constituted a breach of this contractual undertaking; and that the ship is consequently entitled to reimbursement for the judg-

[2] In view of the circumstance that liability insurance policies now carry $10,000–$20,000 deductible clauses (Tetreault, *Seamen, Seaworthiness and the Rights of Harbor Workers,* 39 Cornell L. Q. 381, 417), the statement of Lord Scrutton in *Paterson, Zochonis & Co.* v. *Elder, Dempster & Co.,* [1923] 1 K. B. 420, 442, that the real question is which set of underwriters shall bear the loss must now be taken with a certain amount of reserve.

ment it had to pay. The theory under which the ship seeks recovery is contractual, not quasi-contractual.

I

A. 1. It is well established that where the breach of a contract subjects the promisee to liability to a third party, reimbursement—of indemnity as it is frequently called—constitutes an element of the damages to which the promisee is entitled from the promisor. *Mowbray* v. *Merryweather*, [1895] 2 Q. B. 640 (C. A.); *Schubert* v. *Schubert Wagon Co.*, 249 N. Y. 253. This liability for reimbursement exists in the absence of an express indemnity agreement (*Dunn* v. *Uvalde Asphalt Paving Co.*, 175 N. Y. 214, 217) and may be predicated not merely upon the breach of an express term of the contract but also on the implied undertaking to carry it out in a careful and prudent manner. *Schubert* v. *Schubert Wagon Co.*, 249 N. Y. 253. This rule is not restricted to the common law but covers maritime contracts as well. *Mowbray* v. *Merryweather*, *supra*; *Bethlehem Shipbuilding Corp.* v. *Joseph Gutradt Co.*, 10 F. 2d 769 (C. A. 9). The ship here is thus seeking to enforce an existing type of remedy; the considerations underlying *Halcyon Lines* v. *Haenn Ship. Corp.*, 342 U. S. 282, are accordingly inapplicable.

2. The failure to chock the rolls properly constituted a breach of a contractual duty owed by

the stevedore to the ship and subjected the former to liability for reimbursement. By virtue of the stevedoring contract the stevedore promises the ship to load, stow, and unload its cargo in a safe manner. *Cornec* v. *Baltimore & Ohio R. Co.*, 48 F. 2d 497, 502 (C. A. 4), certiorari denied, 284 U. S. 621. He is responsible to the ship if he fails to perform this duty (*The Robert R.*, 255 Fed. 37, 39 (C. A. 2)), which includes the use of proper dunnage (*The Edith*, 10 F. 2d 684, 685; *The Indien*, 71 F. 2d 752, 756 (C. A. 9).

B. 1. The right to obtain reimbursement is not defeated by the ship's failure to discover the dangerous condition created by the stevedore. An expert contractor cannot escape liability for reimbursement on the ground that his customer failed to supervise him properly. The customer's omissions may constitute a breach of a duty owed by him to the injured third person; he owes, however, no such duty to the contractor. *Mowbray* v. *Merryweather*, [1895] 2 Q. B. 640; *Boston Woven Hose etc. Co.* v. *Kendall*, 178 Mass. 232, 236–237. To the contrary, the customer may rely on the proper performance of the contract by the expert who warrants the skill of his trade. *H. & C. Grayson* v. *Ellerman Line*, [1920] A. C. 466, 472, 474.

2. Similarly, the ship is under no duty to tell the stevedore anything he would know "if [he] knew [his] business" (*Hastorf Contracting Co.* v. *Ocean Transportation Corporation*, 4 F. 2d 583

(S. D. N. Y.), affirmed, 4 F. 2d 584 (C. A. 2)) or to "exercise a high degree of vigilance to see to it that it [the stevedore] performs a plain duty" (*Seaboard Stevedoring Corp.* v. *Sagadahoc S. S. Co.*, 32 F. 2d 886, 887 (C. A. 9)). Thus, it is generally recognized that where a ship has become responsible to a longshoreman as the result of the stevedore's breach of his contractual duty to load, stow, or unload the ship prudently and skillfully, the ship is entitled to be reimbursed even where it was negligent in failing to discover the breach. *Seaboard Stevedoring Corp.* v. *Sagadahoc S. S. Co., supra; Rich* v. *United States,* 177 F. 2d 688 (C. A. 2); *United States* v. *Rothschild International Stevedoring Co.,* 183 F. 2d 181 (C. A. 9); *Read* v. *United States,* 201 F. 2d 758 (C. A. 3); *States S. S. Co.* v. *Rothschild International Stevedoring Co.,* 205 F. 2d 253 (C. A. 9); *Crawford* v. *Pope & Talbot, Inc.,* 206 F. 2d 784 (C. A. 3); *Brown* v. *American-Hawaiian S. S. Co.,* 211 F. 2d 16 (C. A. 3); *Berti* v. *Campagnie de Navigation Cyprien Fabre,* 213 F. 2d 397 (C. A. 2); *McFall* v. *Campagnie Maritime Belge,* 304 N. Y. 314.

The decisions denying reimbursement involved situations where there was no contractual relation between the parties and accordingly no possibility of the breach of a contractual duty (*Slattery* v. *Marra Bros.,* 186 F. 2d 134, 138–139 (C. A. 2)) or where the court found that, although there was a contract, the stevedore had not breached it, *e. g.,* where he justifiably relied on

the soundness of equipment furnished to him by the ship. *American Mutual Liability Co.* v. *Matthews,* 182 F. 2d 323 (C. A. 2).

II

The ship's right to reimbursement, flowing from the breach of an independent duty owed to it by the stevedore, is not curtailed by the exclusive liability provisions of Section 5 of the Longshoremen's and Harbor Workers' Compensation Act.

A. That the longshoreman was an employee of the stevedore and thus could not sue him (because of Section 5) does not defeat the ship's right to reimbursement. For the latter does not seek a quasi-contractual remedy and, hence, it does not matter that its payment of the judgment would not enrich the stevedore. In actions for reimbursement it is immaterial that the defendant has a personal defense as against the original plaintiff. An employer held vicariously responsible for the tort of an employee may seek reimbursement from the latter in spite of the fact that the victim could not have sued the employee directly (on account of the husband-and-wife or father-and-child relationship). *Schubert* v. *Schubert Wagon Co.,* 249 N. Y. 253; *Koontz* v. *Messer,* 320 Pa. 487; *Jones* v. *Kinney,* 113 F. Supp. 923 (W. D. Mo.). The admiralty field furnishes another example (recovery in a both-to-blame situation).

The Chattahoochee, 173 U. S. 540; *Aktslsk. Cuzco* v. *The Sucarseco*, 294 U. S. 394.

Similarly, the provision of a compensation statute barring suit by the employee against his employer does not foreclose suits for reimbursements against the latter by a third person, based upon the breach of an independent contractual duty owed by the employer to the third party. *Westchester Lighting Co.* v. *Westchester County Small Estates Corp.*, 278 N. Y. 175; *Maio* v. *Fahs*, 339 Pa. 180.

B. The ship does not come within the statutory term (in Section 5), "any one otherwise entitled to recover damages." The statute provides that the compensation remedy shall be in place of all other liability of the employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin or *anyone otherwise entitled to recover damages.* Under the customary rules of statutory interpretation, the words "any one otherwise entitled to recover damages" cannot be read without reference to the classes specifically enumerated in the statute. The limitation under the *ejusdem generis* rule of the exclusive remedy provision to relatives and dependents of the employee would not defeat the obvious purpose of the Compensation Act to deal with the relations between the employer and the employee and those dependent upon him, and not with the employer's contractual dealings with third per-

sons. *Westchester Lighting Co.* v. *Westchester County Small Estates Corp.*, 278 N. Y. 175; *American District Telegraph Co.* v. *Kittleson*, 179 F. 2d 946 (C. A. 8).

2. Nor does the ship seek to recover "on account of the employee's injury or death" (the other phrase in Section 5). The ship's claim is based upon the breach of an independent contractual duty owed to it. Its right is not built upon any theory of subrogation to the cause of action which originally belonged to the injured longshoreman (*Schubert* v. *Schubert Wagon Co.*, 249 N. Y. 253) and therefore does not derive from the injury to the employee. *Crawford* v. *Pope & Talbot, Inc.*, 206 F. 2d 784, 792 (C. A. 3).

For these reasons, it has been held unanimously by the federal appellate and state courts that the exclusive liability provisions of compensation acts do not curtail third parties' rights to reimbursement based upon the breach of an independent contractual duty. Decisions which hold that the exclusive remedy provision bars recovery actually deny the right to reimbursement for lack of contractual relationship, absence of a breach of duty, or serious wrongdoing by the plaintiff himself. Denial of reimbursement would permit the stevedore to shift to the ship all the consequences of his breach of the duties owed by him to the ship and to the longshoreman. The Act certainly was not designed to have this unexpected effect.

3. Granting indemnity in the present circum-

stances would not be harmful to the employees or otherwise in violation of the general plan of the Compensation Act.

ARGUMENT

This is, in essence, an action by a shipowner against a contracting stevedore to recover damages for breach of contract to load the vessel properly. The ship hired the professional services of the stevedore—a shoreside specialist in shiploading. As a result of the failure of the stevedore to perform his expert job correctly, one of his own employees was injured and succeeded in holding the ship liable in damages. The question is whether the ship can recover the damages occasioned by the stevedore's breach of contract and thereby shift this loss to the stevedore who contracted to stow the cargo safely.

We shall show, first, that the ship is entitled to be reimbursed by the stevedore on the ground that its liability to the longshoreman was a foreseeable result of the stevedore's failure to perform properly the terms of his contract with the ship; second, that this right to be reimbursed is not affected by the ship's failure to check whether the expert whose services it had engaged actually was performing his specialized task properly; and, finally, that the Longshoremen's and Harbor Workers' Compensation Act, designed to deal with the employer-employee relationship, does not affect the duties contractually

assumed by an independent contractor toward the shipowner, a third person who hires his services.[3]

I. A PERSON WHO IS SUBJECTED TO THIRD PARTY LIABILITY AS THE RESULT OF THE IMPROPER PERFORMANCE OF A CONTRACT BY HIS INDEPENDENT CONTRACTOR IS ENTITLED TO BE REIMBURSED FOR HIS DAMAGES BY SUCH CONTRACTOR, AND THIS LIABILITY IS NOT DEFEATED BECAUSE THE PERSON EMPLOYING THE CONTRACTOR FAILED TO DISCOVER THE DANGEROUS CONDITION WHICH THE CONTRACTOR CREATED

A. THE SHIP IS ENTITLED TO RECOVER FROM THE STEVEDORE SINCE THE BREACH OF THE DUTY TO STOW THE CARGO PROPERLY, OWED BY THE STEVEDORE TO THE SHIP, SUBJECTED THE SHIP TO LIABILITY TO THE LONGSHOREMAN

1. *Indemnity, as used in this case, means the right to recover damages resulting from the breach of a contractual duty in consequence of which a liability has been imposed upon the person to whom the contractual duty was owed*

The ship claims its right to indemnity on the basis that it had entered into a contract with Ryan pursuant to which Ryan undertook to stow the ship safely, that Ryan breached his duty, thereby creating a dangerous condition, and that, as a foreseeable result of this breach of duty, the ship had to pay damages to the longshoreman.

In other contexts, indemnity is frequently ex-

[3] The problems presented by this case are discussed in Weinstock, *The Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers*, 103 U. of Pa. Law Rev. 321 (Dec. 1954).

plained on the quasi-contractual theory that (Woodward, *Law of Quasi-Contracts*, p. 409)[4]:

> * * * [where] one tortfeasor pays what in equity and good conscience another tortfeasor ought to pay, the latter receives a benefit at the expense of the former, the retention of which is unjust.

This definition, however, does not, and does not intend to,[5] take into account the instances—of at least equal importance—where, as here, indemnity is not sought as a method of shifting the incidence of tort liability but rather as reimbursement for damages suffered as the result of the breach of a duty—usually a contractual duty—owed by the so-called indemnitee to the so-called indemnitor.

Since the turn of the century it has been well established as a matter of general law[6] that such "indemnity" is a proper measure of damages to compensate for losses resulting from a breach of contract. *Mowbray* v. *Merryweather*, [1895] 2

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[4] See also Keener, *Quasi-Contracts*, p. 408; Leflar, *Contribution and Indemnity between Tortfeasors*, 81 U. of Pa. Law Rev. 130, 147; *City of Chicago* v. *Robbins*, 2 Black 418; *Robbins* v. *City of Chicago*, 4 Wall. 657; *Washington Gas Light Co.* v. *District of Columbia*, 161 U. S. 316; *George's Radio* v. *Capital Transit Co.*, 126 F. 2d 219, 222 (C. A. D. C.); *Restatement of the Law of Restitution*, Secs. 76, 86.

[5] *Restatement of the Law of Restitution*, pp. 328–329; cf. Keener, *Quasi-Contracts*, p. 25.

[6] The stevedoring contract is a maritime contract and as such governed by federal general law. *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 61–62; *American Stevedores* v. *Porello*, 330 U. S. 446, 456.

Q. B. 640 (C. A.), involving a factual situation somewhat resembling the one at bar, contains probably the first discussion of the pertinent considerations. There, a ship had engaged a stevedore to discharge the cargo and agreed to furnish all the necessary cranes, winches, chains, and other equipment needed for that purpose. One of the chains was defective and broke, injuring one of the stevedore's employees. The longshoreman recovered £125 from his employer, who in turn sought to recover this sum from the ship. The Court of Appeal affirmed a judgment for the plaintiff. It held that in the circumstances of the case the ship had given an implied warranty that the chain was sound and that this warranty had been breached. Moreover, it was within the contemplation of the parties that a defect in the chain might result in injury to a longshoreman for which the stevedore would be held responsible. Hence, these damages were not too remote and the stevedore was entitled to be indemnified for the sum to be paid to his employee, and was not limited to nominal damages.

This specific application of the hornbook rule of *Hadley* v. *Baxendale,* 9 Ex. 341, 156 Eng. Repts. 145, was quickly followed in this country: *Boston Woven Hose etc. Co.* v. *Kendall,* 178 Mass. 232 (1901)—quoted with approval by this Court in *Union Stock Yards Co.* v. *Chicago, etc., R. Co.,* 196 U. S. 217, 226–227 (1905)—held, relying on *Mowbray* v. *Merryweather, supra,* that

where the purchaser of a boiler had become liable to third persons as the result of an explosion of the boiler, he was entitled to indemnity from the boiler-maker as damages for breach of warranty. And *Dunn* v. *Uvalde Asphalt Paving Co.*, 175 N. Y. 214, 217 (1903), held that where a contractor had become liable to third persons as the result of the negligent performance of a contract by a subcontractor, the latter was liable to indemnify the former, even where the parties had not expressly stipulated for such indemnity.

The classical exposition of the considerations underlying indemnity of the compensatory type—as contrasted with quasi-contractual indemnity—appears in the opinion of Chief Judge Cardozo in *Schubert* v. *Schubert Wagon Co.*, 249 N. Y. 253. That case involved the question whether a wife injured by her husband in the course of his employment could recover from his employer although New York law did not permit any suit between husband and wife. Disposing of the argument that if the wife could recover from the employer the latter could, in turn, obtain indemnity from the husband-servant and thus achieve by indirection what could not be done directly, Chief Judge Cardozo said (249 N. Y. at 257):

> We are told that in the long run the consequences of upholding an action against the master may be to cast the burden on the husband, since the master, if not personally at fault, has a remedy over (*Oceanic Steam*

Nav. Co. v. *Compania Trans-Atlantica Espanola*, 134 N. Y. 461; *Wash. Gas Light Co.* v. *District of Columbia*, 161 U. S. 316, 327; *Boston, etc., Co.* v. *Kendall*, 178 Mass. 232). The consequences may be admitted without admitting its significance as a determining factor in the solution of the problem. *The master who recovers over against the servant does not have to build his right upon any theory of subrogation to a cause of action once belonging to the victim of the injury. A sufficient basis for his recovery is the breach of an independent duty owing to himself. The servant owes the duty to the master to render faithful service, and must answer for the damage if the quality of the service is lower than the standard.* (*Dunn* v. *Uvalde Asphalt Paving Co.*, 175 N. Y. 214.) [Emphasis added.]

Thus, it is now generally recognized that a promise to perform a task includes an undertaking to carry it out in a careful, prudent manner, and where a breach of this duty subjects the promisee to liability toward third persons the former is entitled to reimbursement or indemnity. See, *e. g.*, *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314, 330; *Wright* v. *Wright*, 229 N. C. 503, 508–509; *Maryland Cas. Co.* v. *Employers Mut. Liab. Ins. Co.*, 208 F. 2d 731, 733 (C. A. 2); *United States* v. *Savage Truck Line*, 209 F. 2d 442, 447 (C. A. 4), certiorari denied, 347 U. S. 952;

Restatement of the Law of Contracts, Section 334;[7] Williston, *Contracts* (Rev. Ed. 1937), Section 1394; Williston, *Sales,* (Rev. Ed. 1948) Section 614 (a); *Restatement of the Law of Restitution,* Part I, Chapter 3, Topic 3, Introductory Note, pp. 328–329, Sections 93–96; *Restatement of the Law of Agency,* Section 401 (c).

Decisions dealing with maritime contracts follow the same pattern. We have already referred to *Mowbray* v. *Merryweather,* [1895] 2 Q. B. 640 (C. A.), *supra,* pp. 21–22. Another leading case in this field is *Bethlehem Shipbuilding Corp.* v. *Joseph Gutradt Co.,* 10 F. 2d 769 (C. A. 9). A ship repair company having undertaken to repair a ship's valves had failed to put one of these valves back into working condition. As a result, some of the cargo was damaged and the ship was held responsible for the loss. The court held that the ship was entitled to be reimbursed for the "damages which the steamship company had to pay the shipper because of the damaged cargo on account of the defective clapper valves" (10 F. 2d at 772).

It follows from this established rule that in the instant case the ship is entitled to reimbursement if it can show that Ryan breached a duty he

[7] Section 334, Illustration 5 is a paraphrase of *Mowbray* v. *Merryweather,* [1895] 2 Q. B. 640 (C. A.).

[8] Cf. Seavey & Scott's Notes on the *Restatement of the Law of Restitution,* p. 150.

undertook to perform under the stevedoring contract. Moreover, since the ship is pursuing a well-established common-law remedy for "indemnity", the considerations underlying the decision of this Court in *Halcyon Lines* v. *Haenn Ship. Corp.*, 342 U. S. 282, 285–287, are inapplicable. The *Halcyon Lines* case involved the question whether in a non-collision maritime tort, in which the ship itself had been guilty of serious negligence,[9] the Court should follow the common law rule which prohibits *contribution* among joint tortfeasors, or the admiralty rule which requires it. In the silence of Congress, the Court was unwilling to apply the peculiar admiralty rule in the non-collision field. Here the situation is quite different. The ship does not ask this Court to follow a peculiar admiralty rule; to the contrary, it is the petitioner who asks the Court to depart from well-trodden paths followed generally throughout the entire field of the law and applied both at common law and in the area of maritime law by experienced admiralty judges in this country as well as in England.[10]

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[9] Cf. *Baccile* v. *Halcyon Lines*, 187 F. 2d 403, 403–404 (C. A. 3).

[10] It has been recognized generally that the *Halcyon Lines* case does not apply where indemnity rather than contribution is claimed. See, *e. g.*, *States S. S. Co.* v. *Rothschild International Stevedoring Co.*, 205 F. 2d 253 (C. A. 9); *Crawford* v. *Pope & Talbot, Inc.*, 206 F. 2d 784 (C. A. 3); *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314, 328.

2. *The improper stowage of the pulp rolls constituted the breach of a contractual duty owed by the stevedoring company to the ship*

The District Court found that the pulp rolls were improperly stowed because they were chocked with thin pieces of wood rather than with wedges (R. 318–319); the Court of Appeals agreed and stated expressly that "Ryan created the hazardous condition by its improper stowage of the pulp paper rolls at Georgetown" (R. 326–327). And while the ship was held responsible to the original longshoreman–plaintiff on a theory of breach of warranty of seaworthiness and negligent failure to discover the dangerous condition (R. 319, 325–326), as between the ship and the stevedore the latter was exclusively responsible for the proper stowage of the cargo.

A stevedore holds himself out to be an experienced technician engaged in the business of *safely* loading, stowing, and unloading cargo. Cf. *Cornec* v. *Baltimore & Ohio R. Co.*, 48 F. 2d 497, 502 (C. A. 4), certiorari denied, 284 U. S. 621; *The Evelyn*, 282 Fed. 250, 252 (C. A. 2); *McGeeney* v. *Moran Towing Corp.*, 149 F. 2d 791 (C. A. 2). Like any other contractor (*supra*, pp. 21–25), he is responsible to the ship if he fails to perform his duties in a reasonable and prudent manner. *The Robert R.*, 255 Fed. 37, 39 (C. A. 2); *Metcalfe* v. *Chiarello*, 294 Fed. 29, 30 (C. A. 2); *The S. C. L. No. 9*, 114 F.

2d 964, 968 (C. A. 3). And the use of proper dunnage is an element of proper stowage. *The Edith,* 10 F. 2d 684, 685 (C. A. 2); *The Indien,* 71 F. 2d 752, 756 (C.A. 9).

The time-honored clauses that the stevedore "act under the captain's orders"[11] or that he perform his task "to the general satisfaction of the mate in charge of the vessel" (R. 214) do not affect the status of the stevedore as an expert independent contractor, or make him a mere agent of the ship. They mean at most that the captain retains responsibility for the stability of the ship,[12] and have no bearing on the details of the work or the methods of stowage. *Gallagher* v. *United States Lines Co.,* 206 F. 2d 177, 179–180

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[11] *Blaikie* v. *Stembridge,* 6 C. B. (N. S.) 894, 908, 141 Eng. Repts. 703, 709.

[12] *Olsen* v. *United States Shipping Co.,* 213 Fed. 18, 21 (C. A. 2). While it is sometimes said that even where the charterer or stevedore assumes responsibility for loading and that "the duty rests upon the master * * * to see that cargo is properly stowed so that the vessel will be seaworthy" (*Cornec* v. *Baltimore & Ohio R. Co.,* 48 F. 2d 497, 502 (C. A. 4), certiorari denied, 284 U. S. 621; *Canadian Transport Co.* v. *Court Line, Ltd.* [1940] A. C. 934, 937–938, 952 (H. of L.)), the term "seaworthy" is used here in a narrow sense limited to the "trim and safety of the ship" (*Blaikie* v. *Stembridge,* 6 C. B. (N. S.) 894, 909, 141 Eng. 703, 709, affirmed, 6 C. B. (N. S.) 911, 141 Eng. Rept. 710; *The Catherine Chalmers,* 2 Asp. Mar. Cas. (N. S.) 598), or with reference to dangers caused by "the perils of the seas" (Viscount Finlay dissenting on other grounds in *Elder, Dempster & Co.* v. *Paterson, Zochonis & Co.,* [1924] A. C. 522, 539); see also *Oxford Paper Co.* v. *The Nidarholm,* 282 U. S. 681, 684–685. It does not include such other aspects of seaworthiness as the cargo, the crew, or the longshoremen.

(C. A. 2), certiorari denied, 346 U. S. 897; *Cornec* v. *Baltimore & Ohio R. Co.*, 48 F. 2d 497, 502 (C. A. 4), certiorari denied, 284 U. S. 621.[13]

In short, the stevedore breached his duty owed to the ship to stow the ship properly and as a result the latter was exposed to liability toward a third party, the longshoreman. The ship accordingly is entitled to indemnity unless this right is defeated by the trial court's finding that the ship was negligent to the extent of failing to discover the dangerous condition caused by the stevedore.

B. THE RIGHT TO REIMBURSEMENT FOR BREACH OF CONTRACT IS NOT DEFEATED BY A FINDING OF FAILURE TO DISCOVER OR TO CORRECT A DEFECT CAUSED BY THE EXPERT INDEPENDENT CONTRACTOR

1. *A contractor cannot defeat a claim for indemnity by urging that his client's reliance on his professed skill constituted negligence*

Petitioner asserts that the ship's claim for indemnity is defeated because it had been held liable to the longshoreman not merely for breach of the warranty of seaworthiness, *i. e.*, without fault (*Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 94),

[13] The stevedore is not even exonerated if he follows improper advice given by the ship. Such instructions are usually considered only suggestions, and if they are faulty, the stevedore, in view of his superior experience, is supposed to disregard them or stop working until the dangerous condition is remedied. *McGeeney* v. *Moran Towing Corp.*, 149 F. 2d 791 (C. A. 2); cf. *The Robert R.*, 255 Fed. 37 (C. A. 2); *Smith* v. *Nicholson Transit Co.*, 39 F. Supp. 795 (W. D. N. Y.).

but also for a negligent failure to discover that petitioner had breached its contract. The negligence consisted, however, merely in the failure to discover the dangerous condition caused by the stevedore and, as between the ship and the stevedore, the former had the right to assume that the latter would carry out its contractual undertakings properly. The stevedore cannot raise the stultifying defense that the customer must keep the most careful check over the manner in which the contractor, hired by him for his expertise, carries out the terms of the contract at the risk of otherwise forfeiting his right to recover for a breach.

If any degree of negligence on the part of the indemnitee could defeat the right to indemnity, that legal remedy would be a rare one indeed, limited to the unusual situation in which liability is imposed without fault or to instances of an express contract of indemnity.[14] But as this Court pointed out in *Union Stock Yards Co.* v. *Chicago, etc., R. R.*, 196 U. S. 217, 228, the typical situation in which indemnity may be awarded is one in which

> * * * [t]he principal and moving cause, resulting in the injury sustained, was the act of the first wrongdoer [the indemnitor]

[14] *Boston Woven Hose etc. Co.* v. *Kendall*, 178 Mass. 232, 236–237.

> and the other [the indemnitee] has been held liable to third persons *for failing to discover or correct the defect* caused by the positive act of the other [the indemnitor]. [Emphasis and matter in brackets added.]

While the indemnitee may have violated a duty toward the original plaintiff in neglecting to discover the dangerous condition, he owes no such duty to the indemnitor (*Mowbray* v. *Merryweather*, [1895] 2 Q. B. 640 (*supra*, pp. 21–22)). As Chief Justice Holmes pointed out in *Boston Woven Hose etc. Co.* v. *Kendall*, 178 Mass. 232, 236–237, this failure usually is induced by the very representation of the contractor that he would perform his undertaking properly. Certainly, a customer is entitled to rely to a large degree on the specialized knowledge and expertise of contractors "professing competence and experience" and who warrant the skill of their trade ("*spondentes peritiam artis*"). *H. & C. Grayson* v. *Ellerman Line*, [1920] A. C. 466, 472, 474 (H. of L.).

For these reasons, it is generally recognized that the mere failure to inspect or to discover a dangerous condition does not defeat the right to indemnity, and this is particularly true in those situations where, in view of the contractual relationship between the indemnitor and indemnitee, the latter is justified in relying on the proper performance of the contract by the former. *Bethlehem Shipbuilding Corp.* v. *Joseph Gutradt Co.*,

10 F. 2d 769, 772 (C. A. 9);[15] *Derry Electric Co.* v. *New England Telephone & Telegraph Co.*, 31 F. 2d 51, 52 (C. A. 1); *Manning Mfg. Co.* v. *Hartol Products Corp.*, 99 F. 2d 813, 814 (C. A. 2); *General Accident, etc.* v. *Goodyear Tire & Rubber Co.*, 132 F. 2d 122, 125 (C. A. 2); *Booth-Kelly Lumber Co.* v. *Southern Pacific Co.*, 183 F. 2d 902, 907 (C. A. 9); *Restatement of the Law of Restitution*, Secs. 93, 95, comment a, par. 2; Leflar, *Contribution and Indemnity between Tortfeasors*, 81 U. of Pa. Law Rev. 130, 156–158; Note: *Contribution and Indemnity Between Joint Tort Feasors*, 45 Harv. Law Rev. 349, 351–352.

2. *Since the ship owed its duty to discover improper stowage only to the longshoreman and not to the stevedore, its negligence does not defeat the right to indemnity*

The considerations which permit a customer to obtain indemnity from his contractor even where the former was negligent in failing to discover the dangerous condition created by the contractor apply with equal force to the ship-stevedore relationship. We have referred *supra* (p. 27) to the circumstance that the stevedore holds himself out to a specialist. As such "the stevedoring company owes to the vessel and her owners the duty of using due care in the loading; but the

[15] *Supra*, p. 25. The court held that even the discovery of the failure of the repair company to fix one of the valves did not cast upon the ship the duty to assume that other valves were defective (at 772).

vessel and her owners owe no such duty to the stevedoring company." *Cornec* v. *Baltimore & Ohio R. Co.*, 48 F. 2d 497, 502 (C. A. 4), certiorari denied, 284 U. S. 621. In the words of Learned Hand, J., the ship is under no duty to tell the stevedore anything he would know if he knew his business, such as, *e. g.*, the proper method of stowage.[16] And as there is no requirement that for the stevedore's benefit the ship's officers must "exercise a high degree of vigilance to see that it [the stevedore] performs a plain duty,"[17] a ship which has been held responsible to a longshoreman because of a dangerous condition created by the stevedore in violation of his contractual undertaking is entitled to be indemnified whether or not it might have been negligent itself in failing to discover the defect—and so the lower appellate courts have consistently held. *Seaboard Stevedoring Corp.* v. *Sagadahoc S. S. Co.*, 32 F. 2d 886 (C. A. 9); *Rich* v. *United States*, 177 F. 2d 688 (C. A. 2); *United States* v. *Rothschild International Stevedoring Co.*, 183 F. 2d 181 (C. A. 9); *Read* v. *United States*, 201 F. 2d 758 (C. A. 3); *States S. S. Co.* v. *Rothschild Inter-*

[16] *Hastorf Contracting Co.* v. *Ocean Transportation Corporation*, 4 F. 2d 583 (S. D. N. Y., L. Hand, J.), affirmed, 4 F. 2d 584 (C. A. 2); *Red Star Barge Line* v. *Luria Bros. & Co.*, 116 F. Supp. 656 (S. D. N. Y.).

[17] *Seaboard Stevedoring Co.* v. *Sagadahoc S. S. Co.*, 32 F. 2d 886, 887 (C. A. 9).

national Stevedoring Co., 205 F. 2d 253 (C. A. 9);[18] *Crawford* v. *Pope & Talbot, Inc.*, 206 F. 2d 784, 791–794 (C. A. 3); *Brown* v. *American-Hawaiian S. S. Co.*, 211 F. 2d 16 (C. A. 3); *Berti* v. *Compagnie de Navigation Cyprien Fabre*, 213 F. 2d 397 (C. A. 2); *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314, 327–331.

The instances in which federal appellate courts have denied indemnity all involved factors which are absent in the instant case. These decisions fall into three general categories. First, where the stevedore did not stand in any contractual relation or other relation to the ship except that of a joint tortfeasor: *Slatteryj* v. *Marra Bros.*, 186 F. 2d 134, 138–139 (C. A. 2). Second, where the ship and stevedore stood in a contractual relationship, but either the stevedore had not been guilty of any negligence (*The Slingsby*, 116 Fed. 227, 228 (E. D. N. Y.), affirmed, 120 Fed. 748 (C. A. 2); *Spaulding* v. *Parry Nav. Co.*, 187 F. 2d 257 (C. A. 2)) or the ship had furnished defective equipment to the stevedore and the court felt that in the circumstances the stevedore owed no duty to the ship to test it (*American Mutual Liability Co.* v. *Matthews*, 182 F. 2d 323 (C. A. 2[19] *Gill* v. *United States*, 184 F. 2d 49 (C. A.

[18] In that case the stevedore had been hired by a non-demise charterer and not by the ship (205 F. 2d at 255). The court nevertheless held that the stevedore owed the ship a duty to refrain from negligent practices which would subject the ship to liability to third parties.

[19] Note the comment on this decision in Larson, *The Law of Workmen's Compensation*, Vol. II, Section 76.43, pp. 237,

2); *Mikkelsen* v. *S. S. Granville,* 191 F. 2d 858, rehearing denied, 192 F. 2d 809 (C. A. 2) [20]). Finally, where the ship had been guilty of independently culpable acts sufficiently serious to bar full indemnity, *i. e.,* where it would be entitled at most to contribution (*cf. infra,* fn. 37, pp. 47–48) (*Halcyon Lines* v. *Haenn Ship. Corp.,* 342 U. S. 282; *Pope & Talbot, Inc.* v. *Hawn,* 346 U. S. 406, 407–408; *Lo Bue* v. *United States,* 188 F. 2d 800 (C. A. 2); *Union Sulphur & Oil Corp.* v. *W. J. Jones & Son, Inc.,* 195 F. 2d 93 (C. A. 9)).

In the instant case, Ryan was under a contractual duty to the ship to load the rolls prop-

238: "The duty to inspect the rope was a duty only toward his own employee, not toward the third party who furnished the rope. To say that the employer had a duty toward the supplier would be to say that the employer agreed to indemnify the supplier for the results of the supplier's own negligence in furnishing defective rope."

On the other hand, if the stevedore uses defective equipment, furnished to him by the ship, in the knowledge of its defectiveness, he breaches a duty owed by him to the ship and is liable in indemnity, *United States* v. *Rothschild International Stevedoring Co.,* 183 F. 2d 181 (C. A. 9), and cf. fn. 13, *supra,* p. 29. For a recent analogous decision in the nonmaritime field, see *United States* v. *Savage Truck Line Co.,* 209 F. 2d 442 (C. A. 4), certiorari denied, 347 U. S. 952, where a shipper, which had improperly loaded a truck to the knowledge of the carrier, had been held responsible to third persons injured in an accident caused by the improper loading. The court held that the shipper was entitled to be indemnified by the carrier.

[20] The District Court opinion indicates that the ship had furnished defective equipment to the stevedore. 101 F. Supp. 566, 568–569 (E. D. N. Y.).

erly,[21] and the ship has been subjected to liability to a longshoreman as the result of a violation of Ryan's duty in circumstances in which the ship's sole fault was the failure to discover Ryan's breach of contract.[22] The ship is therefore entitled to indemnity unless, as claimed by petitioner, the Longshoremen's and Harbor Workers' Act operates so as to destroy this contractual remedy between two persons not involved in the employer-employee relationship with which that Act is concerned.

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[21] While this issue has not been raised directly by the pleadings, it may be pointed out that Ryan additionally breached its contract to discharge the ship safely when it continued the unloading operations after discovering that the rolls were inadequately secured, thus constituting a hazard, and did not await the arrival of wedges with which the cargo could be chocked safely. Cf. p. 29, fn. 13, *supra*; see also *United States* v. *Arrow Stevedoring Co.*, 175 F. 2d 329 (C. A. 9), certiorari denied, 338 U. S. 904.

[22] Petitioner's Point III asserts that the District Court denied recovery to the ship on the ground that it had been guilty of active negligence and that the Court of Appeals erred in disturbing this finding. The pertinent finding of the District Court was "the cargo officer in the exercise of reasonable care should have discovered and corrected the condition" (R. 319). The Court of Appeals did not disturb this finding of fact (R. 326) but ruled as a matter of law, in accord with applicable precedent (*supra*, pp. 29–34), that this neglect did not defeat the ship's right to be reimbursed.

II. THE SHIP'S RIGHT TO BE INDEMNIFIED FOR THE LIABILITY CAST UPON IT AS THE RESULT OF THE STEVEDORE'S BREACH OF CONTRACT IS NOT DEFEATED BY THE OPERATION OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

We have shown that under both common and maritime law the ship is entitled to indemnity for the liability to the longshoreman it incurred as the consequence of the breach of the duty owed by the stevedore to the ship. This right to be indemnified has not been curtailed by the operation of the Longshoreman's Act, Section 5 (*supra*, pp. 2–3) of which prevents direct action by the longshoreman against his employer and provides that the compensation remedy shall be exclusive.

A. THE INABILITY OF THE LONGSHOREMAN TO SUE THE STEVEDORE DOES NOT IN ITSELF DEFEAT THE SHIP'S RIGHT TO REIMBURSEMENT FROM THE STEVEDORE

The basis of the stevedore's liability to indemnify the ship is a breach of a contractual obligation, and is not grounded in quasi-contract. The circumstance that the payment of the judgment by the ship does not relieve the stevedore of any liability, and consequently does not enrich him, therefore does not defeat the ship's right to indemnity or reimbursement.

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[23] At least pro in excess of the compensation liability. Cf. *Baccile* v. *Halcyon Lines*, 187 F. 2d 403 (C. A. 3), reversed on other grounds, *sub nom. Halcyon Lines* v. *Haenn Ship. Corp.*, 342 U. S. 282.

A well known application of this rule is the situation alluded to *supra*, pp. 23–24, where suit is brought against an employer on a theory of vicarious liability in spite of the fact that the plaintiff could not have sued the employee on account of the husband-and-wife or father-and-child relationship. Of the decisions dealing with this problem the majority hold that the inability of the plaintiff to sue the employee does not constitute a bar to a suit against the employer.[24] They are unanimous, however, in holding that, where the employer can be sued in spite of the employee's immunity from direct suit, this immunity does not constitute a bar to an action for indemnity by the employer against the employee, because the latter action is based upon the breach of the independent duty to render competent service.[25] *Schubert* v. *Schubert Wagon Co.*, 249 N. Y. 253, 257–258; *Chase* v. *New Haven Waste Material Corp.*, 111 Conn. 377, 381–382; *Miller* v. *J. A. Tyrholm & Co., Inc.*, 196 Minn. 438, 442; *Hudson* v. *Gas Consumers' Association*, 123 N. J. L. 252, 254–255; *Wright* v. *Wright*, 229 N. C. 503, 508–509; *Koontz* v. *Messer*, 320 Pa. 487, 492–495;

[24] For the minority rule see fn. 25, *infra*.

[25] Recognizing that to permit the wife or child to sue the employer would be tantamount to exposing the husband or father to indemnity claims of the employer, four jurisdictions have felt this result so undesirable that they bar suits against the employer. *Maine* v. *Maine & Sons Co.*, 198 Iowa 1278, 1281; *Riegger* v. *Bruton Brewing Co.*, 178 Md. 518, 524; *Emerson* v. *Western Seed & Irrigation Co.*, 116 Neb. 180, 185; *Graham* v. *Miller*, 182 Tenn. 434, 441–442.

Briggs v. *City of Philadelphia*, 112 Pa. Super. Ct. 50, 55–57; *Poulin* v. *Graham*, 102 Vt. 307, 310–311; *Hensel* v. *Hensel Yellow Cab Co.*, 209 Wis. 489, 502–504; *Jones* v. *Kinney*, 113 F. Supp. 923 (W. D. Mo.).

The admiralty field furnishes another familiar instance in which a remedy over is permitted in spite of the inability of the original plaintiff to sue the ultimate defendant. In the case of a both-to-blame collision the owner of cargo may be prevented by Section 3 of the Harter Act[26] from recovering damages from the carrying vessel; he may, however, proceed against the non-carrying vessel. When the loss is to be divided between the two ships, the non-carrying vessel may include among its damages the sums paid to the cargo owners of the carrying vessel. As a result, the carrying vessel ultimately bears one-half of the loss to its own cargo because both vessels are at fault, in spite of the fact that the cargo owner could not have proceeded directly against it for its own fault. *The Chattahoochee*, 173 U. S. 540; *Aktslsk. Cuzco* v. *The Sucarseco*, 294 U. S. 394,

[26] Section 3 of the Harter Act (27 Stat. 445, 46 U. S. C. 192) substantially re-enacted as Section 4 of the Carriage of Goods by Sea Act, 49 Stat. 1210, 46 U. S. C. 1304), provides in substance that, if a vessel is seaworthy, neither it nor its owner shall be responsible for damages to the cargo caused by faults or errors in navigation. For a recent discussion of the statute see *United States* v. *Atlantic Mutual Ins. Co.*, 343 U. S. 236.

400-401; and see *United States* v. *Atlantic Mutual Ins. Co.*, 343 U. S. 236.

It thus appears that the inability of the original plaintiff to sue the ultimate defendant does not constitute *per se* a bar to an indemnity action against the latter.[37] The consequence that economically the employer, by reason of his contractual undertaking, is made to bear a burden which would not be imposed upon him directly by the longshoreman, or that this permits "an encircling movement where a frontal attack * * * is inhibited",[38] does not change the result. As a matter of law, the indemnitee (the ship) bases its claim on the breach of an independent legal duty owed to it. It does not stand in the shoes of the original plaintiff as a subrogee. *Supra*, p. 24. Accordingly, it has been held on the authority of the decisions permitting suits against the husband's employer that the inability of the worker to sue the employer, as provided in workmen's compensation acts, does not by itself bar indemnity claims against the latter. *Westchester Lighting Co.* v. *Westchester County Small Estates Corp.*, 278 N. Y. 175, 180;[39] *Mato* v. *Fahs*, 339 Pa. 180, 190.

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[37] Chief Justice Hughes pointed out that this liability was imposed in effect as a foreseeable consequence of the maritime tort of collision.

[38] *Emerson* v. *Western Seed & Irrigation Co.*, 116 Neb. 180, 185.

[39] This case interpreting the N. Y. Workmen's Compensation Act, the model of the Longshoremen's and Harbor Workers' Compensation Act (cf., *e. g.*, *Case* v. *Pillsbury*, 148 F. 2d 392 (C. A. 9)), is the leading case in the field and its

B. SECTION 5 OF THE LONGSHOREMEN'S ACT DOES NOT PROHIBIT SUITS FOR COMPENSATORY INDEMNITY

We have shown in the preceding pages that this indemnity action is not foreclosed merely because the Longshoremen's Act prevents the longshoreman from suing his employer. We are concerned in this sub-point with petitioner's contention that Section 5 of the Longshoremen's Act expressly precludes this claim for indemnity.

Section 5 (*supra*, pp. 2–3) provides in pertinent part that the compensation remedy

> * * * shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin and *any one otherwise entitled to recover dam-*

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reasoning has been incorporated in several of the basic decisions interpreting the federal statute. Cf. *Rich* v. *United States*, 177 F. 2d 688, 691 (C. A. 2); *Slattery* v. *Marra Bros.*, 186 F. 2d 134, 138 (C. A. 2); *Lo Bue* v. *United States*, 188 F. 2d 800, 803 (C. A. 2); *Crawford* v. *Pope & Talbot, Inc.*, 206 F. 2d 784, 790 (C. A. 3); *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314, 331.

[39] We have pointed out, *supra*, p. 38, fn. 25, that in some jurisdictions the circumstance that the original plaintiff could not sue the ultimate defendant directly has been used as a reason for also denying him a remedy against the third party, lest the policy underlying the immunity from direct suit be jeopardized by operation of the rules of indemnity. The Longshoremen's Act, however, far from prohibiting suits against the third party, expressly authorizes them. Section 33 (a). In these circumstances, it may be safely assumed that in the absence of an express provision to the contrary the statute envisages indemnity proceedings of the third party against the employer for breach of the latter's independent duty to the third party.

> *ages* from such employer at law or in admiralty *on account of such injury or death* * * *. [Emphasis added.]

Petitioner takes the position that respondent and its claim come within the statutory terms of (a) "any one otherwise entitled to recover damages," and (b) "damages * * * on account of such injury or death." We submit that neither proposition is correct.

1. *The exclusive remedy provision of Section 5 is limited to the employee and his dependents; it does not apply to persons whose claims are based upon contracts independent of the employment relationship*

Section 5 provides that the statutory compensation remedy shall be exclusive with respect to the liability of the employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, or "any one otherwise entitled to recover damages." The specific categories enumerated by the statute are the employee, his relatives, and his dependents. Petitioner seeks to apply the general words "any one otherwise entitled to recover damages" to a person (like the shipowner) claiming for the breach of a commercial contract unconnected with the employer's dealings with his workers and their families. But under the customary rules of statutory construction the general term "any one otherwise entitled to recover damages" cannot be given a content totally unrelated to the classes

especially mentioned by the statute.[31] Ordinarily, "general terms which follow specific ones [are limited] to matters similar to those specified." *Gooch* v. *United States*, 297 U. S. 124, 128; see also *In re Bush Terminal Co.*, 93 F. 2d 659, 660 (C. A. 2).

In applying the *ejusdem generis* rule, caution must of course be taken not "to defeat the obvious purpose of legislation." *Gooch* v. *United States*, 297 U. S. 124, 128; *United States* v. *Alpers*, 338 U. S. 680, 682–683. In the instant case, however, the limitation of the general words "any one otherwise entitled to recover damages" to the employee, his family, and dependents—to the exclusion of those claiming under a contract unrelated to the employment nexus—would accord fully with the normal scope of workmen's compensation legislation. It is generally recognized that these statutes deal with the relationship of the employer with his employees and their dependents and that it is not to be assumed, in the absence of an express indication to the contrary, that they are designed to interfere with the contractual relationships of the employer with third persons. *Westchester Lighting Co.* v. *West-*

[31] "* * * it must be admitted that the entire impression given by the quoted passage [Section 5 of the Act], listing as it does only persons who are directly in the employee's right, is that it did not mean, by adding 'or any one' to open up a new field of immunity applicable to secondary or corollary litigation related to the injury." Larson, *The Law of Workmen's Compensation*, Vol. 2, Section 76.30, p. 235.

chester County Small Estates Corp., 278 N. Y. 175, 179–180;[*] *American District Telegraph Co.* v. *Kittleson*, 179 F. 2d 946 (C. A. 8); *Baugh* v. *Rogers*, 24 Cal. 2d 200, 214–216; *Lunderberg* v. *Bierman*, 63 N. W. 2d 355, 365 (Minn., 1954). In other words, the scope of Section 5 "is limited to liability of the employer to those entitled to damages from the injury or death of the employee, without any contract relationship to the employer other than the employment." *United States* v. *Arrow Stevedoring Co.*, 175 F. 2d 329, 332 (C. A. 9), certiorari denied, 338 U. S. 904.

As we have indicated above, petitioner's liability to respondent is based upon a commercial contract, not on any employment relationship. In these circumstances, respondent does not come within the statutory scope of "any one otherwise entitled to recover damages." Nor does it come within the policy of the statute. The compensation acts, in conferring immunity on the employer from common law suits by the employee and his dependents, did not mean to free the employer from suits by outsiders. The injured employee and his dependents get a substantial *quid pro quo*, in receiving assured compensation payments regardless of fault as a substitute for tort recoveries. The third party has received nothing, and hence should not be held to have given up the valuable contract rights he would have in the

[*] On the profound effect of this decision on the interpretation of the federal Act see *supra*, pp. 40–41, fn. 29.

absence of the statute. It is unfair to bring the third party within the rule of mutual sacrifice when his advantage is to be sacrificed without any compensatory gain.

2. *Since petitioner's liability to respondent is based upon the breach of an independent contractual duty owed to respondent, it is not "on account of such [the employee's] injury or death"*

We have just shown that a party claiming reimbursement on the basis of an independent contract is not "any one otherwise entitled to recover damages" within the meaning of Section 5. This result alone is sufficient to deny the benefit of the statute to petitioner. In addition, the claim for reimbursement is not one "on account of such injury or death." Since the asserted liability is bottomed on an independent contractual duty owed by petitioner to respondent, the latter "does not need to build his right upon any theory of subrogation to a cause of action once belonging to the victim of the injury."[33] He does not stand in the employee's shoes, nor does he seek an equitable readjustment of the incidence of tort liability (*supra*, pp. 20–21).

Accordingly, the courts have recognized that (*Crawford* v. *Pope & Talbot, Inc.*, 206 F. 2d 784, 792 (C. A. 3)):

> * * * the indemnitee has a claim which is independent of and does not derive from

[33] *Schubert* v. *Schubert Wagon Co.*, 249 N. Y. 253, 257.

> the injury to the employee, except in a remote sense not within the provisions of Section 5.

The federal appellate courts are in full agreement that a true claim for indemnity, *i. e.*, one based upon the breach of an independent duty, is not barred by Section 5. *United States* v. *Arrow Stevedoring Co.*, 175 F. 2d 329, 332 (C. A. 9), certiorari denied, 338 U. S. 904; *Rich* v. *United States*, 177 F. 2d 688, 691 (C. A. 2); *United States* v. *Rothschild International Stevedoring Co.*, 183 F. 2d 181 (C. A. 9); *Read* v. *United States*, 201 F. 2d 758, 763–764 (C. A. 3); *States S. S. Co.* v. *Rothschild International Stevedoring Co.*, 205 F. 2d 253, 256–257 (C. A. 9); *Brown* v. *American-Hawaiian S. S. Co.*, 211 F. 2d 16, 18 (C. A. 3); and see *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314 (interpreting the federal statute).[34]

The decisions which hold that Section 5 or the analogous provisions of a state compensation act defeat the remedy over—discussed in the appendix to petitioner's brief—are all instances where

[34] The decisions interpreting the state compensation acts come to the same result: California: *Baugh* v. *Rogers*, 24 Cal. 2d 200, 206–217; Connecticut: *Farm Bureau Mut. Auto. Ins. Co.* v. *Kohn Bros. Tobacco Co.*, 107 A. 2d 406, 408; Iowa: *American District Telegraph Co.* v. *Kittleson*, 179 F. 2d 946, 953–955; Minnesota: *Lunderberg* v. *Bierman*, 63 N. W. 2d 355, 361–365; New York: *Westchester Lighting Co.* v. *Westchester Small Estates Corp.*, 278 N. Y. 175, 179; *Burris* v. *American Chicle Co.*, 120 F. 2d 218, 220 (C. A. 2); New Jersey: *Yearicks* v. *City of Wildwood*, 23 N. J. Super. 379, 382–383; cf. *Farren* v. *New Jersey Turnpike Authority*, 31 N. J. Super. 356, 106 A. 2d 752, 754.

the courts either failed to find an independent duty owed to the third party by the employer (*i. e.*, where their sole relationship was that of joint tortfeasors[35]), or the employer had not breached any duty he owed the third party,[36] or the third party himself had been guilty of negligence sufficiently serious as to deny him the right to full indemnity.[37] Indeed, numerous decisions

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[35] *Slattery* v. *Marra Bros.*, 186 F. 2d 134, 138–139 (C. A. 2); *Congressional Country Club* v. *Baltimore & Ohio R. Co.*, 194 Md. 533; *Sanchez* v. *Hill Lines*, 123 F. Supp. 42, 43 (D. N. M.) (New Mexico law); *Hunsucker* v. *High Point etc. Chair Co.*, 237 N. C. 559, 566–569; *Peak Drilling Co.* v. *Halliburton Oil Well Cementing Co.*, 215 F. 2d 368, 370–372 (C. A. 10, Oklahoma law); *Buggs* v. *Wolff*, 201 Wisc. 533. *Guse* v. *A. O. Smith Corp.*, 260 Wisc. 493, involved a suit by a wife for loss of consortium, not an action for reimbursement for breach of contract.

[36] In particular, these are the cases where the accident had been caused by defective equipment furnished by the third party to the employer. *American Mutual Liability Ins. Co.* v. *Matthews*, 182 F. 2d 322, 323 (C. A. 2), and see the discussion of the *Matthews* case in *Slattery* v. *Marra Bros.*, 186 F. 2d 134 at 139 (C. A. 2); *Gill* v. *United States*, 184 F. 2d 49 (C. A. 2); *Mickkelsen* v. *S. S. Granville*, 191 F. 2d 858, rehearing denied, 192 F. 2d 809 (C. A. 2) (see *supra*, p. 25, fn. 20); see also *Spaulding* v. *Parry Nav. Co.*, 187 F. 2d 257 (C. A. 2).

[37] *Lo Bué* v. *United States*, 188 F. 2d 800 (C. A. 2); *Hawn* v. *Pope & Talbot, Inc.*, 198 F. 2d 800, 807 (C. A. 3), affirmed, 346 U. S. 406, 408. *Standard, etc.* v. *Ruckert Ter. Corp.*, 193 Md. 20, holding that Section 5 of the federal statute precluded relief, involved a situation in which apparently the employer owed no independent duty to the third party which in turn was itself guilty of serious negligence. The decision, however, contains a dictum to the effect that Section 5 also bars true indemnity claims. State statutes: *Bankers Indemnity Ins. Co.* v. *Cleveland Hardware & Forging Co.*, 77 Ohio

holding that relief was barred by the exclusive remedy clause have stressed that the ruling would have been to the contrary if there had been an independent contract,[38] or breach thereof.[39]

Thus, the same tests determine whether the ship can recover under the theory of indemnity and also whether it is excepted from the operation of Section 5. If it can show that it is entitled to indemnity, it follows automatically that Section 5

App. 121; *Maio* v. *Fahs*, 339 Pa. 180, 192 (in view of the Pennsylvania contribution statute, the employer was held responsible to contribute up to the amount of his compensation liability).

The third party would not be entitled to *contribution* in this situation. The first element of contribution, *viz.*, a common liability, is missing, because the liability of the employer is based upon the compensation statute and is not dependent upon a tort. *American Mutual Liability Ins. Co.*; v. *Matthews*, 182 F. 2d 322, 323 (C. A. 2); *Lo Bue* v. *United States*, 188 F. 2d 800, 802 (C. A. 2). Apart from this basic difficulty, this Court has indicated its unwillingness in the absence of a statute to depart, in the field of non-maritime torts, from the common-law rule that there cannot be contribution between joint tortfeasors. *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282; *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 407–408. Moreover, contribution is essentially a tort remedy and would probably constitute a liability "on account of such injury or death" proscribed by Section 5. Cf. *United States* v. *Yellow Cab Co.*, 340 U. S. 543, 548.

[38] *Hunsucker* v. *High Point etc. Chair Co.*, 237 N. C. 559, 566, 568; *Peak Drilling Co.* v. *Halliburton Oil Well Cementing Co.*, 215 F. 2d 368, 371–372 (C. A. 10). Cf. *Slattery* v. *Marra Bros.*, 186 F. 2d 134, 138 (C. A. 2).

[39] *American Mut. Liability Ins. Co.* v. *Matthews*, 182 F. 2d 322, 324 (C. A. 2); and see, conversely, the admonition upon remand in *Brown* v. *American-Hawaiian Lines*, 211 F. 2d 16, 18 (C. A. 3): "there can be no action of indemnity in these cases which is not based on the violation of some contractual duty."

is inapplicable. Conversely, if it cannot establish a claim for indemnity, it cannot recover at all (*supra*, p. 48, fn. 37). Section 5 does not have a separate role in this type of case.

If the ship could not recover over, the stevedore would be relieved of the entire burden of the accident[40] caused by the stevedore's breach of his contractual undertaking, even in those instances where the stevedore alone is at fault[41] or where, as here, the sole fault of the ship consists in its mistaken assumption that the stevedore would carry out the terms of his contract faithfully.[42]

3. *The inapplicability of Section 5 in indemnity cases does not violate the statutory plan or injure the employee*

Petitioner argues that recovery by the ship would cast an uninsurable liability upon the employer and would encourage the employer to contest employees' claims rather than pay them voluntarily. Neither of these contentions is sound.

a. Petitioner asserts that the policy underlying workmen's compensation legislation, *viz.* that the employer protect itself by insurance from the risks

[40] On analogy to Section 33 (e) (1) (*supra*, p. 4), Ryan's compensation carrier has been reimbursed for all payments made by it (*supra*, p. 10).

[41] *Alaska S. S. Co.* v. *Petterson*, 347 U. S. 396; see also *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 100; *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 412–413.

[42] This result has been criticized as "profitable negligence." Tetreault, *Seamen, Seaworthiness and the Rights of Harbor Workers*, 39 Cornell L. Q. 381, 423.

of industrial accidents,[43] would be frustrated if it were subject to this claim for breach of contract which is said to be uninsurable. Initially, the very premise of this argument is fallacious. The employer is held responsible in indemnity not as the result of the employee's injury, but because it improperly performed its contract of stowage entered into with the ship. For all we know, it should be able to obtain insurance for liability imposed upon it for the breach of its stevedoring contracts.

Other stevedore and repair contractors procure such coverage pursuant to contracts with the United States. As a matter of fact, moreover, petitioner is probably protected by its standard compensation policy. The New York Court of Appeals, which holds that the New York Compensation Act does not exclude indemnity, has also held in *Cardinal* v. *State of New York*, 304 N. Y. 400, certiorari denied, 345 U. S. 918, that indemnity is a liability imposed by law[44] and accordingly covered by paragraph One (b) of the familiar form of the workmen's compensation policy.[45]

b. Nor can it be said that the employer's temptation to resist compensation claims would be

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[43] Cf. Section 32 of the Act.

[44] Cf. *Lo Bue* v. *United States*, 188 F. 2d 800, 803 (C. A. 2), also based on the premise that indemnity is a liability imposed by law.

[45] For the text of this policy, see Larson, *The Law of Workmen's Compensation*, Vol. 2, Appendix E, p. 564.

seriously increased if claims for indemnity were allowed. Petitioner points to Section 33 (b) of the Act pursuant to which the employee must assign to the employer all claims against third parties if he accepts an award, while he retains control over the third-party action if he accepts voluntary compensation payments. It is petitioner's position that the employer would refuse to pay compensation voluntarily and thereby compel the making of an award which would result in the assignment to him of the third-party complaint. Petitioner implies that once the third-party action is assigned to the employer he would not utilize it. This argument, however, does not take into consideration the circumstance that, if the employer recovers against the third party on the assigned claim, he may retain an amount equal to all compensation benefits paid by him or his compensation carrier (Section 33 (e) 1, *supra*, p. 4).

Thus, the stevedore is under a strong motivation to resist voluntary compensation and to obtain an assignment of the third party claim, regardless of the outcome of the present controversy. If indemnity is denied, he may seek to obtain an assignment in order to bring a third party action and thereby cast the entire burden of the accident upon the ship. If it is granted, it is in his interest to sequester the action so as to forestall indemnity.

It should be borne in mind, however, that these considerations are of limited weight. A denial of

the right of indemnity would not put an end to suits by the longshoreman against the ship and thus terminate the entire problem. Section 33 (a) still leaves with the employee the final decision as to whether a third party action is to be brought, and so long as the employee feels that he has a substantial chance to recover a greater sum from the ship he will bring suit in normal course.[46] The employee's decision will not be much affected by whether the recovery is ultimately borne by the employer or by the ship.

CONCLUSION

For the above reasons, it is respectfully submitted that the decision of the Court of Appeals for the Second Circuit should be affirmed.

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Solicitor General.
WARREN E. BURGER,
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PAUL A. SWEENEY,
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HERMAN MARCUSE,
Attorneys.

FEBRUARY 1955.

[46] Section 33 (f) (*supra*, p. 5) provides that the employer is required to pay as compensation "a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person."

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No. 1

In the Supreme Court of the United States

OCTOBER TERM, 1954

RYAN STEVEDORING CO., INC., PETITIONER

v.

PAN-ATLANTIC STEAMSHIP CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN RESPONSE TO PETITIONER'S REPLY BRIEF

SIMON E. SOBELOFF,
Solicitor General,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 157

RYAN STEVEDORING CO., INC., PETITIONER

v.

PAN-ATLANTIC STEAMSHIP CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN RESPONSE TO PETITIONER'S REPLY BRIEF

Petitioner's reply brief contains a number of contentions which, as we believe, require a brief answer.

1. Petitioner argues that the statutory clause "anyone otherwise entitled to recover damages from such employer . . . . on account of such injury or death" must be construed as defeating the ship's claim to be reimbursed for the breach by the stevedoring company of its agreement to stow the ship properly because otherwise the statutory

clause would not have any meaning whatever. We submit, basically, that the clause probably was inserted by the draftsman out of superabundance of caution, to cover the contingency that the statutory enumeration of "employee, his legal representative, husband or wife, parents, dependents, next of kin" may possibly have omitted some member of the class of relatives and dependents the act intended to bar from suit, and, possibly, also in order to cover subrogation claims.[1] If the clause had any concrete legislative purpose going beyond those limits, we submit that it was never intended to go as far as "to open up a new field of immunity applicable to secondary or corollary litigation" (Larson, *The Law of Workmen's Compensation*, Vol. 2, Section 76.30, p. 235) and to defeat independent contractual obligations. It is significant that the lower federal and the state courts agree with our position and that of respondent on this issue. See our main brief, pp. 43-44.

In any event, as we have shown on pages 45-46 of our main brief, the ship does not come within the second branch of the clause. It does not claim "on account of such [the employee's] injury or death", but solely on account of the breach of its agreement.

With respect to Chief Judge Crane's dissent in *Westchester Lighting Co. v. Westchester County Small Estates Corp.*, 278 N. Y. 175, 180-185, we wish to point out that no other member of the court

[1] E.g., of the type raised in *Standard etc. v. Ruckert Ter. Corp.*, 193 Md. 29, *infra*.

joined his dissent and that no other appellate court, confronted with the problem, has held that it was "mere sophistry" to construe a compensation statute as not designed to interfere with the liability of the employer to third persons for breach of an independent contractual duty.

The decision in *Standard etc.* v. *Ruckert Ter. Corp.*, 193 Md. 20, did not involve the issues here presented. An employee of Ruckert was injured on a vessel. After he had sued the ship, the latter impleaded Ruckert on the ground that Ruckert had failed to provide its employee "with a safe place to work and to instruct him as to a safe manner in which to perform his duties" (193 Md. 20, 23). Indemnity, accordingly, was sought on the basis of the breach of a duty owed by the employer to the employee, not to the indemnitee. This in effect was a subrogation claim "on account of the employee's injury" and thus barred by the statute. Aside from its dictum, that decision has no bearing on a claim for indemnity based on the breach of an independent contractual duty owed by the employer to the third person.

2. Petitioner points to the supposed anomaly that, if indemnity in the form of damages for breach of contract would be awarded in the instant case, the stevedore's total liability would be lower if he were solely negligent than if his negligence concurred with that of the ship. Assuming that such an "anomaly" exists, it would be no different from the one discussed by this Court in *United States* v. *Atlantic Mutual Ins. Co.*, 343 U. S. 236,

241, with respect to liability for cargo damage. There, it was pointed out that in a collision case the ship solely responsible may be exempted from liability for damage to the cargo carried by it, while it may ultimately bear one half of the loss in a both-to-blame situation (cf. the discussion in our main brief at pp. 39-40).

Actually, however, the stevedoring company would not necessarily be immune from indemnity claims when it is solely at fault. In many instances the sole negligence of the stevedoring company will make the ship unseaworthy; this in turn will make the ship responsible to the longshoreman,[2] and give rise to an indemnity claim. We cannot perceive of any policy consideration why reimbursement should be denied in such a situation. Indeed, we believe that when this Court authorized suits against the ship for unseaworthiness, where that condition was caused by the sole fault of another person, it held by implication that the ship could obtain reimbursement from the true wrongdoer, especially if the creation of the unseaworthy condition also constituted the breach of a contractual undertaking owed by the latter to the ship.

3. On pages 8-10, petitioner advances the theory that indemnity is not granted as damages for a breach of contract but only on the basis of the tort principles of comparative negligence. This thesis is the very inverse of the careful analysis of this problem by *Learned Hand*, J., in *Slattery* v. *Marra*

[2] *Alaska S.S. Co.* v. *Petterson*, 347 U.S. 396.

Bros., 186 F. 2d 134, 138-139, (C. A. 2), on which petitioner itself relies so heavily. In the *Slattery* case, Judge Hand stressed (p. 138-139) that the shipowner can bottom his recovery only on the breach of a duty—usually contractual—owed to him. He expressly refused to grant indemnity on a theory of comparative negligence between two parties whose sole relationship was that of joint tort feasors; he even characterized this tort type of "indemnity" (in contrast to reimbursement for breach of contract) as an "extreme form of contribution."[3]

4. The purpose of the complicated express indemnity clauses (cf. pp. 10-11 of petitioner's reply brief), frequently embodied in stevedoring agreements (cf. *American Stevedores* v. *Porello*, 330 U. S. 446), is of course to alter the liability the law imposes in their absence by increasing or diminishing it.

5. As *amicus curiae*, we are not directly concerned with the last point raised by petitioner on pp. 11-12 of its reply brief. Nevertheless, we submit that the Court of Appeals had authority to reexamine the issue whether the finding of negligence made by the district court, *i.e.*, the failure to discover a dangerous condition, did as a matter of law defeat recovery for a breach of the undertaking to

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[3] For a detailed analysis of the *Slattery* opinion, see Weinstock, *The Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers*, 103 U. of Pa. Law Rev. 321, 336-342 (1954).

stow the cargo competently (cf. our main brief, p. 36 fn. 22).

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

MARCH 1955

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IN THE

Supreme Court of the United States

October Term, 1954.

No. 157.

RYAN STEVEDORING CO., INC.,
Petitioner,

v.

PAN-ATLANTIC STEAMSHIP CORPORATION,
Respondent.

MOTION OF AMERICAN MERCHANT MARINE INSTITUTE, INC. FOR LEAVE TO FILE A BRIEF AMICUS CURIAE.

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IN THE

Supreme Court of the United States.

October Term, 1954.

No. 157.

RYAN STEVEDORING CO., INC.,
Petitioner,

v.

PAN-ATLANTIC STEAMSHIP CORPORATION,
Respondent.

Motion of American Merchant Marine Institute, Inc. for Leave to File a Brief Amicus Curiae.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The American Merchant Marine Institute, Inc. respectfully applies to this Court for leave to file a brief as an *amicus curiae* in the above entitled action. Respondent has consented to the applicant's filing of a brief *amicus*. Petitioner has refused consent.

The fundamental question presented by the present petition concerns the right of a steamship company to recover from a contracting stevedore, by an action for indemnity, those damages which the steamship company may be compelled to pay to a longshoreman injured because of

a condition negligently created by his own stevedore-employer.

Interest of American Merchant Marine Institute, Inc.

The American Merchant Marine Institute, Inc. is a non-profit New York membership corporation. Its members include 65 steamship companies which operate dry cargo and passenger vessels, colliers and tankers having a gross tonnage of nearly 6,750,000 tons. This represents about 60% of the privately owned American-flag merchant marine now operating in our foreign and domestic trades.

The problem which is presented in the present petition for certiorari is of extreme importance to your applicant and its member companies. Very substantial sums are at stake in cases already pending which involve this problem, and it goes without saying that additional sums can be expected to be at stake in a multitude of similar instances in the future. It is true that some of these potential losses are insured. However, others must be borne by the steamship companies. In any event, all marine insurance rates are calculated directly upon the basis of losses incurred. Hence this Court's decision in the present case will inevitably have a direct and important bearing upon the operating costs of American steamship companies and consequently upon their ability to compete in the world market.

Reasons for Submission of Brief.

Counsel for your applicant have spent a substantial amount of time in studying all available documents in the instant case as well as the relevant authorities. On the basis of such study, and as a result of conferences between counsel for your applicant and respondent's counsel, your applicant has reason to believe that certain questions of law which are relevant to the issues herein, and may ultimately be deemed to be of controlling importance, will not be covered in respondent's brief.

Your applicant is informed that respondent's argument will be addressed primarily toward the proposition that the shipowner's right of indemnity derives from, and is supported by, the contractual relationship which existed between the parties to this particular case. By way of supplementing this argument, and perhaps furnishing a broad background for its applicability, your applicant believes it will be of value to this Court if it be permitted to discuss in a brief those fundamental principles of law which govern the right of one liable without fault to recover indemnity from another whose fault has produced the injury. These points will not, we understand, be covered in the briefs of the parties.

The decision of this Court in the present case will represent a significant addition to the general maritime law. Your applicant is mindful that in the past, this Court has added to this body of law principles which deviate in some instances from those applicable to the shoreside law in similar controversies. We do not urge that symmetry is a necessary end, in and of itself. Concededly there are situations in which dissimilarity is justified, perhaps even compelled by varying circumstances. However, your applicant desires to demonstrate in a brief that there are well-established principles of law (which incidentally have heretofore been recognized by this Court even in cases arising under the maritime law) which are of importance and may well be deemed controlling in the present instance; and that they support the award of indemnity in this case. Moreover, your applicant desires to demonstrate that in the setting of this controversy, there is no valid reason why there should be any departure from these principles simply because the tort herein was committed upon navigable waters. These subjects, we are advised, the respondent does not propose to discuss in its brief.

It has not been feasible to present the instant motion at an earlier date due to the necessity for first determining respondent's proposed argument.

For the foregoing reasons, it is respectfully requested that this application for leave to file a brief as *amicus curiae* be granted.

Respectfully submitted,

AMERICAN MERCHANT MARINE INSTITUTE, INC.

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IN THE

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OCTOBER TERM, 1954

No. 427

RYAN STEVEDORING CO., INC.,

Petitioner,

—v.—

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION OF PETITIONER FOR REHEARING

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IN THE

United States Supreme Court

OCTOBER TERM, 1954

No. 157

RYAN STEVEDORING CO., INC.,

Petitioner,

—v.—

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION OF PETITIONER FOR REHEARING

Petitioner, Ryan Stevedoring Co., Inc., respectfully presents this, its petition for rehearing, in the above entitled matter, and, in support thereof, presents the following:

Introduction

Petitioner was the employer of a longshoreman, Frank Palazzolo, who on July 20, 1949 was injured aboard a vessel of respondent during its discharge at the port of New York. To recover pecuniary damages for such injuries, Palazzolo brought an action against Pan-Atlantic Steamship Corporation, respondent herein. The respondent impleaded petitioner as a third party defendant and sought full indemnity.

From a judgment in favor of Palazzolo against respondent and in favor of petitioner dismissing respondent's third party complaint (111 F. Supp. 505), respondent ap-

pealed to the United States Court of Appeals, Second Circuit. Said Court, in an opinion reported in 211 F. 2d 277, affirmed the injured longshoreman's judgment against respondent and reversed the judgment which denied indemnity to respondent.

Ryan's petition for certiorari was granted by order of this Court filed October 14, 1954 (R. 329). It would appear that all Justices of the Court participated.

Oral argument was had on March 3 and 4, 1955 before a bench composed of eight Justices, there being a vacancy due to Mr. Justice Jackson's death.

A judgment of affirmance by an equally divided Court of eight Justices was entered on April 11, 1955 with the notation that Mr. Justice Harlan took no part in the consideration or decision of the case. The following are, it is respectfully submitted, the petitioner's

Grounds for Rehearing

1. Petitioner assumes that the tremendous public (the entire shipping industry) interest in the questions which were presented by its petition for certiorari was one of the reasons for this Court's grant of certiorari by order filed October 14, 1954. The fact that (a) the National Association of Stevedores,[1] representing 150 stevedoring firms operating in 39 ports of the United States, (b) American Merchant Marine Institute, Inc.,[2] representing 65 steamship companies or 60% of the privately owned American-flag merchant marine, and (c) The Association of American

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1 Motion to file brief as *amicus* denied by order of this Court filed Oct. 14, 1954.

2 Motion to file brief as *amicus* denied by order of this Court filed Feb. 28, 1955.

Shipowners, representing other United States flag shipping companies operating in the coastwise, intercoastal and foreign trades, sought leave to file briefs *amici curiae* to show the importance of the question and their views of the law demonstrates the tremendous importance of the questions presented and the impact this Court's decision on the questions presented will have on the entire shipping industry.[3]

The Solicitor General's letter to the Clerk of this Court advising of the intentions of the Government to file a brief as *amicus curiae* respecting the questions raised by petitioner stated:

> "The determination of these issues is of great interest to the United States, which is the world's largest shipowner and which acts as self insurer with respect to many of its vessels."

Indeed, the Solicitor General's office, having been granted leave by order of this Court filed February 28, 1955, presented oral argument on March 3, 1955 in support of the contentions of respondent.

Because of the tremendous importance to the Maritime Industry of the questions presented by petitioner,[4] to say nothing of the importance of a determination for the guidance of the United States District Courts and the Courts of Appeals, a rehearing is, petitioner respectfully urges, eminently desirable. This case commends itself, we most humbly submit, to a rehearing since at the time of the original hearing of March 3 and 4, 1955, there was a

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3 Motion to file brief as *amicus* denied by order of this Court filed March 7, 1955.

4 It is familiar learning now that an equal division of this Court settles no principle presented for consideration. *Etting v. The Bank of the United States*, 11 Wheat. (U. S.) 59, 6 L. Ed. 419.

vacancy which has now been filled by Mr. Justice Harlan and it may reasonably be expected that a rehearing by a full bench would result in a final determination. In this connection, the Court is respectfully referred to:

Mayor of New York v. *Miln*, 8 Peters 120; 33 U. S. 120;
Bernard v. *Johnson*, 313 U. S. 537, 597;
Lisenba v. *California*, 313 U. S. 537, 597;
Commercial Molasses Corp. v. *N. Y. Tank Barge Corp.*, 313 U. S. 541, 596;
N. Y. Chicago & St. L. R.R. Co. v. *Frank*, 313 U. S. 538, 596;
Toucey v. *N. Y. Life Ins. Co.*, 313 U. S. 538, 596;
Baltimore & Ohio R. Co. v. *Kepner*, 313 U. S. 542, 597;
Reitz v. *Mealey*, 313 U. S. 542, 597.

Petitioner appreciates full well that the granting of a petition for rehearing rests in the sound discretion of the Court. The tremendous importance to one of the foremost industries of our country of obtaining a resolution of the questions presented by petitioner in its petition for certiorari merits rehearing—this, especially where there is an equally divided Court and a Justice available for rehearing who did not participate in a consideration of the case or in a decision thereof. (Cf. *Bruice's Juices* v. *Am. Can Co.*, 327 U. S. 758; 327 U. S. 812, 330 U. S. 743; *MacGregor* v. *Westinghouse*, 327 U. S. 758, 327 U. S. 812; 329 U. S. 402.)

2. The first two questions[5] that were presented to this Court by petitioner are present in hundreds, if not indeed,

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5 Said questions were as follows:

(1) Is a contracting stevedore, who complies with the provisions of the U. S. Longshoremen's and Harbor Workers' Compensation Act, Title 33, United States Code, §901 *et seq.*, insulated under the very

thousands, of pending cases in the federal and state Courts. Indeed, as the United States Court of Appeals for the Second Circuit said in *Berti* v. *Compagnie de Navigation Cyprien Fabre*, 213 F. 2d 397, 398:

> "This appeal involves the *recurring problems* of liability of a vessel owner to an injured employee of the stevedore it has hired to load or unload the vessel and of the liability of the stevedore for indemnity to the vessel owner." (Italics supplied.)

Surely, the questions which permeate all litigation of the type here involved where the parties are aligned as they are should be resolved by this Court. Especially we submit should this be so where the judicial energy of this Court has been expended and its time consumed in considering the petition for a writ of certiorari, hearing argument upon the issues after granting certiorari, considering the same in conference, and arriving at a decision, albeit by an equally divided Court. This Court, on this application for a rehearing, is being asked not to concern itself with the particular litigants involved but to settle the law between man (shipowner) and man (stevedore-employer). That there is a need for the same cannot be gainsaid.

To obtain a statement of the pendency of the many cases in which the principles of law, sought to be decided in the instant matter, are involved, counsel for petitioner

---

wording of the Act (§905) from any claim or action in which full indemnity (there being no express contract of indemnity) is sought against him by a shipowner who has been held liable to an employee of the contracting stevedore?

(2) If the aforesaid Act, as worded, does not furnish complete immunity to a contracting stevedore against a claim of indemnity, implied in law, of a shipowner who has been liable to an injured employee of the contracting stevedore, can there be indemnity implied in the maritime law (there being no express contract of indemnity) between joint tortfeasors in a non-collision case, i.e., a personal injury action?

wrote to Chief Judge Inch of the United States District Court for the Eastern District of New York. Petitioner's counsel's letter is printed in the Appendix hereto and marked Exhibit A. Chief Judge Inch's reply thereto is printed in the Appendix hereto and marked Exhibit B.

A fair reading of the same will show, in petitioner's opinion, the need and desirability of obtaining a determination of the questions of law posed by petitioner. The original letter of Chief Judge Inch will be submitted to the Clerk of this Court simultaneously with the filing of this petition.

Petitioner's counsel went further. He caused a search to be made by his office of the dockets of the United States District Courts for the Southern and Eastern Districts of New York.

A search of the dockets of the said Courts shows the following:

(a) There are at least *64* cases pending on the admiralty and law side of the United States District Court for the Eastern District of New York where indemnity, implied in law, is sought from an employer by a shipowner, who has been sued by the third party defendant's employee.

(b) There are at least *53* cases pending on the admiralty and law side of the United States District Court for the Southern District of New York of the type referred to in subdivision (a) above.

Petitioner has set forth a listing of the pending cases in the aforesaid Districts in the Appendix hereto.

There can be no question, petitioner submits, that the determination of the questions presented by petitioner is of significant importance in the administration and handling of this type of litigation by the lower federal Courts.

If the questions posed by petitioner, are left undecided, as they now are, the judicial energy and consideration of this Court has gone for naught in that another case of the type here involved will, it is to be assumed, be presented to this Court in the near future. In the interim, the lower federal Courts' (and also the State Courts') energy and time will have to be expended in the matters pending therein and in those matters yet to be instituted in order to find a solution to the troublesome questions with which this Court has wrestled. Irrespective of the results arrived at by the District Courts, the Courts of Appeals will be confronted again and again with the questions which have been presented to this Court by the petitioner.

Wherefore, your petitioner respectfully prays that its petition for rehearing be granted and upon further consideration that the judgment of the Court below be reversed to which end this petition is

Respectfully submitted,

SIDNEY A. SCHWARTZ,
Counsel for Petitioner,
Ryan Stevedoring Co., Inc.

May 2, 1955.

Certificate of Counsel

I, SIDNEY A. SCHWARTZ, counsel for the above-named petitioner, do hereby certify that the foregoing petition and application is presented in good faith and not for delay.

SIDNEY A. SCHWARTZ
Counsel for Petitioner.

APPENDIX

Exhibit A

April 14, 1955

Honorable Robert A. Inch
United States District Court Judge
United States District Court
Eastern District of New York

Re: Ryan Stevedoring Co., Inc.
vs. Pan-Atlantic Steamship
Corporation
No. 157, October Term
Supreme Court, United States

Honorable Sir:

As your Honor knows, the Supreme Court of the United States on April 11, 1955 by an equally divided Court affirmed the judgment of the United States Court of Appeals for the Second Circuit in the captioned matter.

By virtue of the equal division of the Court, with Mr. Justice Harlan taking no part, there is no determination respecting (1) the U. S. Longshoremen's & Harbor Workers' Compensation Act being a bar to a claim of indemnity or (2) the existence of a right of indemnity under the General Maritime Law in a personal injury case of the kind involved in the captioned matter, where the employer has been impleaded by the shipowner who has been sued by the injured longshoreman.

It is my understanding that there are many cases pending in the United States District Court for the Eastern District of New York where the parties are aligned as they

are in the *Ryan* case and where the same questions exist as has been outlined above.

I understand further that the trial of several of these cases, pending in your Court, has been adjourned to await the decision of the Supreme Court in the *Ryan* case—this, on the assumption that the decision will determine the rights, if any, of shipowners against stevedore contractors in a situation of the kind present in the captioned matter.

I contemplate petitioning for a rehearing with the hope that the Supreme Court of the United States will grant rehearing and determine by a full bench the various questions which have been presented by the petitioner.

In order that I may make a proper statement to the Court of the existence of many cases of the type here involved and of the desirability of the question being finitely determined, I am writing to you to obtain a statement as to the pendency of such cases in your Court.

I would appreciate being authorized by you to use your reply in whatever way I see fit.

Respectfully yours,

SIDNEY A. SCHWARTZ

SAS:JH
6062

Exhibit B

April 15, 1955.

Mr. Sidney A. Schwartz
76 Beaver Street
New York 5, N. Y.

Re: Ryan Stevedoring Co. Inc. vs. Pan-Atlantic Steamship Corporation
No. 157, October Term Supreme Court, United States

Dear Mr. Schwartz:

I am in receipt of your letter of April 14, 1955.

You are correct in your understanding that there are presently pending in this Court many cases of the type which you refer to in your letter. In said cases the parties are aligned as they are in the captioned matter, viz., injured longshoremen suing a shipowner and the shipowner impleading the longshoremen's employer and seeking indemnity in the absence of any contract.

The trial of various cases which are pending in this Court has been deferred heretofore to await the decision of the Supreme Court of the United States in your *Ryan* case.

It would be, indeed, most helpful to this Court and, in my opinion, to other District Courts, if the Supreme Court of the United States would find it possible and convenient to finally determine the questions that have been presented in the petition of Ryan Stevedoring Co., Inc., in the captioned matter. A determination of said questions would facilitate the disposition of many cases by way of

settlement or by trial, and such determination would obviate possible appeals in those matters yet to be tried.

You are authorized to use this letter as you see fit.

Very truly yours,

ROBERT A. INCH
Chief Judge,
U. S. District Court

CC sent to:
Fink & Frank, Esqs.
Gay & Behrens, Esqs.

Cases Pending in United States District Courts, Southern and Eastern District of New York

IN EASTERN DISTRICT

ADMIRALTY:

(1) Adm. 18381 — Russo v. U. S. A. v. Universal Terminal & Stevedoring Co., Inc.

(2) Adm. 19976 — Cicolello v. Jacob. Dampsibskliesel-skabt Broduce v. Universal Terminal & Stevedoring Company, Inc.*

(3) Adm. 20212 — Campbell, as Administrator v. U. S. A. v. Monti Marine Corporation

(4) Adm. 19501 — Chiaromonte v. U. S. A. v. American Stevedores, Inc.*

(5) Adm. 20031 — Gaglione v. Den Norske Afrika Og Australieline v. Atlantic Stevedoring Co., Inc.

(6) Adm. 20126 — Vitale v. U. S. A. v. Imperato Stevedoring Corporation*

(7) Adm. 20133 — Bockheld v. U. S. A. v. Monti Marine Corp.

(8) Adm. 20154 — Scotto v. A/S D/S Uvendborg, J. D/S AF 1912 A/S v. Sottnek Co., Inc.

(9) Adm. 20160 — Hansen v. U. S. A. and Erie Basin Works, Inc. v. Banks Ship Rigging Co.*

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1. Legend * after name of case indicates two causes of action in impleading petition or third party complaint—(1) indemnity being sought on express contract of indemnity and (2) indemnity being sought as implied in law.

(10) Adm. 20177	Danetra v. U. S. A. v. American Stevedores, Inc.*
(11) Adm. 20176	Croce v. U. S. A. v. Bethlehem Steel Co.*
(12) Adm. 20175	Thomson v. U. S. A. v. Todd Shipyards Corp.*
(13) Adm. 20174	Puleo v. Universal Oil Carriers, Inc. v. Jarka Corporation
(14) Adm. 20181	Latus v. U. S. A. v. Todd Shipyards Corporation*
(15) Adm. 20179	Carbonaro v. U. S. A. v. Imperato Stevedoring Corp.*
(16) Adm. 20305	Reed v. U. S. A. v. Turner & Blanchard and Nacirema Operating Corp.
(17) Adm. 20291	Martucci v. U. S. A. v. Imperato Stevedoring Corporation*
(18) Adm. 20254	Phelan v. U. S. A. and American Hawaiian Steamship Company v. Sealand Dock & Terminal Corp. and Federal Stevedoring Co., Inc.
(19) Adm. 20252	Daley v. U. S. A. v. Atlantic Basin Shipyard, Inc.*
(20) Adm. 20235	Lucera v. U. S. A. v. Ira S. Bushey & Sons, Inc.*
(21) Adm. 19788	Leonilus v. Den Norske Muddekhauslinge A/S v. Pittston Stevedoring Corp.
(22) Adm. 19815	Lipari v. A/S Ludwig Mowinkels Rederi v. Commercial Stevedoring Co.
(23) Adm. 19806	Moore v. SS American v. Seaboard Machinery Corp. and The Jarka Corp.

(24)	Adm. 19820	Peduto v. U. S. A. v. Pittston Stevedoring Corp.*
(25)	Adm. 19877	Meyer v. U. S. A. v. Atlantic Basin Shipyard, Inc.*
(26)	Adm. 19884	Capodoro & Lavadera v. Westfall Larsen & Co., A/S et al. v. Universal Terminal & Stevedoring Company
(27)	Adm. 19892	Marino v. Jacob Kjode A/S v. Daniels & Kennedy, Inc.
(28)	Adm. 19882	Meglio v. United States Lines, Inc. v. Pittston Stevedoring Co.
(29)	Adm. 20006	Migliaccio v. Skibsaktieselskabet Karabien, et al. v. The Jarka Corporation
(30)	Adm. 20012	Aleixo v. Den Norske Afrika Og Australielinie, et al. v. Atlantic Stevedoring Co., Inc.
(31)	Adm. 20032	Todaro v. Hayland v. Atlas Stevedoring Corp.
(32)	Adm. 20042	Brunese v. M/S Sonnaverd v. Pittston Stevedoring Corporation
(33)	Adm. 20055	Dorvetti v. M. S. Trein Maersk, et al. v. Jules S. Sottnek Co., Inc.
(34)	Adm. 20084	Poggi v. U. S. A. v. Imperato Stevedoring Corporation*
(35)	Adm. 19923	Crupi v. U. S. A. v. American Stevedores, Inc.*
(36)	Adm. 19924	Guirato v. U. S. A. v. American Stevedores, Inc.*
(37)	Adm. 19943	Pedersen v. The Tanker Bucklube v. Todd Shipyards Corporation*

(38) Adm. 19980 Borgerson v. Skibs A/S Abu v. Sigurd Golten Machine Corporation

(39) Adm. 19985 Lyon v. U. S. A. v. Project Construction Corporation*

(40) Adm. 19995 Greenberg v. U. S. A. v. Fred Beattie Repair Corporation*

(41) Adm. 19166 Solla v. Steamship Nyhaug and A/S Atlas v. The Jarka Corporation

(42) Adm. 19622 Louis v. U. S. A. v. Atlantic Basin Shipyard, Inc.*

(43) Adm. 19692 Licata v. International Freighting Corporation, Inc. v. Nessa Corporation

(44) Adm. 19708 Gaston v. U. S. A. v. Hinzmann & Waldmann Marine Corp.*

(45) Adm. 20248 Ran v. U. S. A. v. Maher Stevedoring Corp.*

CIVIL:

(46) C 15155 Renaldi v. Standard Fruit & Steamship Co. v. John W. McGrath Corp.

(47) C 14818 Walby v. Skibs A/S Victoria v. Marra Bros., Inc.

(48) C 14840 Smith v. OSK Lines v. Federal Stevedoring Co., Inc. and Sealand Dock & Terminal Corporation

(49) C 14886 Barbera v. Mitsui Steamship Co., Ltd. and International Terminal Operating Co., Inc.

(50) C 14956 Ruggiero v. Anchor Line, Ltd. v. Bay Ridge Operating Company, Inc.

(51) C 14963 Francis v. Ellerman Lines, Ltd. v. J. W. McGrath Corp.

(51) C 14652 Sczesney v. Waterman Steamship Corp. v. Federal Stevedoring Co., Inc. and Sealand Dock & Terminal Corp.

(53) C 14682 Dennis, Perretta, Borgailo v. Luckenbach Steamship Company, Inc. v. Turner & Blanchard, Inc.

(54) C 14060 Cruz v. Marine Transport Lines, Inc. v. Bethlehem Steel Co.

(55) C 14256 Rohl v. Orion Shipping & Trading Corp. v. Weyerhauser Steamship Company & Nacirema Operating Co., Inc.

(56) C 14466 Di Costanzo v. Mitsui Line v. Jarka Corporation

(57) C 13434 McEwan v. Skibs A/S Glittre v. Sigurd Golten Machine Corp.

(58) C 12619 Wank, as Administratrix v. Universe Tankships, Inc. v. Pyrate Tank Cleaners, Inc.

(59) C 10955 Berti v. Compagnie Fabre v. American Stevedores, Inc.

(60) C 11674 Raffa v. Waterman Steamship Corporation v. The Jarka Corporation

(61) C 11736 Russello v. Luckenbach Steamship Company, Inc. v. Turner & Blanchard, Inc.

(62) C 13332 Stromme v. Skibs A/S Glittre v. Sigurd Golten Machine Corp.

(63) C 12070 Skowronski v. Waterman SS v. Ryan Stevedoring

(64) C 13329 Swiggers v. Waterman SS v. Ryan Stevedoring

IN SOUTHERN DISTRICT

ADMIRALTY:

(1) Ad., 159-129 Salgado v. United States v. Turner & Blanchard

(2) Ad. 174-178 Ferrara v. A/S Sobral v. Nessa Corporation*

(3) Ad. 175-280 Mancini v. Marine Fuel Transfer Corp. v. Oil Tank Cleaning Corp.

(4) Ad. 180-10 Balbach v. United States v. McGrath Corp.

(5) Ad. 180-269 Sullivan v. United States v. Kane Ship Repair*

(6) Ad. 182-246 Seneger v. United States v. McGrath Corp.

(7) Ad. 182-323 Coleman, et al. v. United Fruit v. McGrath Corp.

(8) Ad. 183-1 Mirabito v. M/S Stockholt v. Sottnek Corp.

(9) Ad. 183-20 Rayford v. Gotham v. Nacirema Operating Co.

(10) Ad. 183-41 Halvorsen v. A/S Imica v. Bethlehem Steel Co.

(11)	Ad. 183-227	Perez v. Gotham v. Nacirema Operating Co.
(12)	Ad. 184-265	Fatovic v. Nederlandsche, etc. v. Jarka Corp.
(13)	Ad. 179-260	Howell v. U. S. A. v. Maher Stevedoring Corporation
(14)	Ad. 183-237	Rejlls v. SS Gezina Brovig v. States Terminal Corporation
(15)	Ad. 179-309	Di Niquilli v. U. S. A. v. American Stevedores, Inc.
(16)	Ad. 180-107	Vicki v. U. S. A. v. Maher Stevedoring Corporation*
(17)	Ad. 183-357	Hellenic Lines, Ltd. v. John W. McGrath Corporation**

CIVIL:

(18)	C 55-167	Klop v. United Fruit v. Bethlehem Steel Co.
(19)	C 57-3	Guerriero v. American President Lines v. Turner and Blanchard
(20)	C 64-3	Alvares v. Waterman Steamship v. Jarka Corp.
(21)	C 66-115	Luzzul v. Compagnie Maritime v. Transoceanic Terminal
(22)	C 68-284	Venson, et al. v. Luckenbach Steamship v. Jarka Corp.

** Action brought by shipowner to recover indemnity on contract and implied in law where the shipowner had settled with stevedore's employee and then brought this independent action.

(23) C 70-242	Marrale v. Waterman Steamship v. Jarka Corp.
(24) C 73-299	Matthews v. Compagnie Generale v. McGrath
(25) C 73-315	Torrens v. Waterman Steamship v. Jarka Corp.
(26) C 74-294	Ricci v. Lord Brasileiro v. Universal Terminal
(27) C 75-202	Coleman v. Howlett v. International Stevedoring
(28) C 75-210	Belgiovino v. Waterman Steamship v. Jarka Corp.
(29) C 77-80	Andersen v. National Bulk v. Pyrate Tank Cleaners
(30) C 77-272	Mirabito v. International Freighting Corp. v. Nessa Corp.
(31) C 79-77	Israelson v. Universal Tank Ship v. Pyrate Tank Cleaners
(32) 82-100	Perez v. Lackenbach Steamship Corp. v. Jarka Corp.
(33) C 83-160	Scala v. Moore McCormack v. Atlantic Coast Contracting Co.
(34) C 86-125	Bolten v. Khedivial Mail Line v. Jarka Corp.
(35) C 87-180	Gasparovich v. U. S. Lines v. T. Hogan & Sons
(36) C 89-19	Mazza v. A/S J. Ludwig Mowinckels Rederi v. International Stevedoring Corporation

(37) C 89-184	Fatovic v. Holland American Line v. Jarka Corporation
(38) C 90-176	Linares v. United Fruit v. Bethlehem Steel
(39) C 91-37	Brogan v. Den Norske Amerika Linje v. Turner & Blanchard
(40) C 92-127	O'Connell v. United States Lines v. T. Hogan & Sons
(41) C 93-160	Kucharski v. Luckenbach Steamship Corp. v. Jarka Corp.
(42) C 95-193	Henry v. Luckenbach Steamship Corp. v. Jarka Corp.
(43) C 96-27	Dominguez v. Moore McCormack v. Jarka Corporation
(44) C 97-303	Neloms v. Pacific Atlantic Steamship Corp. v. Jarka Corp.
(45) C 99-13	Allen v. States Marine v. Allports Stevedoring Corp.
(46) C 39-248	Stupicic v. Pan-Atlantic Steamship Corp. v. Ryan Stevedoring Co., Inc.
(47) C 79-18	Mustach v. Waterman Steamship Corp. v. Ryan Stevedoring Co., Inc.
(48) C 82-377	Espaillat v. Bull Steamship Co. v. Rinaldi & Co.
(49) C 79-210	Skupski, as Administratrix v. Western Navigation Corp. v. Maher Stevedoring Corp.
(50) C 86-70	Traponotto v. Flota Mercante Grancolombiana v. American Stevedores, Inc.

(51) C 80-227	Bonura v. Matson Navigation Company v. Brady & Gioe, Inc.
(52) C 98-167	Dillard v. Societa Armamento Marittimo v. Maher Stevedoring Corporation
(53) C 81-365	Brown, as Administratrix v. Union Sulphur v. Allports Stevedoring Co., Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1954

No. ~~157~~ 4

RYAN STEVEDORING CO., INC.,

Petitioner,

against

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL ASSOCIATION OF STEVEDORES AS *AMICUS CURIAE* PURSUANT TO RULE 42

PAUL SPEER,
Counsel for Amicus Curiae,
99 John Street,
New York 38, N. Y.

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A stevedore employer's compliance with the U. S. Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 901, *et seq.*, is a complete bar to any claim for indemnity, either partial or in full, made by a shipowner based on damages for injuries paid to an employee of the stevedore employer	6
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33 U. S. C. A. 901	2, 5, 6
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IN THE

Supreme Court of the United States

OCTOBER TERM 1954

No. 157

RYAN STEVEDORING CO., INC.,
Petitioner,
against
PAN-ATLANTIC STEAMSHIP CORPORATION,
Respondent.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

NOW comes the NATIONAL ASSOCIATION OF STEVEDORES and respectfully moves this Court, pursuant to Rule 42 of the rules of this Court, for leave to file the accompanying brief in this case *amicus curiae*. The consent of the attorney for the petitioner herein for the filing of this brief has been obtained and filed with the Clerk of the Court. The consent of the attorney for the respondent was requested but was refused. The interest of the National Association of Stevedores and its reasons for leave to file a brief *amicus curiae* are set forth below.

Movant is a non-profit association composed of 150 firms engaged in stevedoring operations in 39 different ports of the United States of America, including all of the major ports of the United States of America located on the East, West and Gulf Coasts of the United States. The one hundred fifty members of the association handle the ma-

jority of the cargoes imported and exported through all of the coastal ports of the United States.

Movant desires that the accompanying brief be filed on its behalf and on behalf of all of the members of the association in order that the Court may have before it the point of view of the stevedoring industry, because the decision in this case has a far reaching effect on the stevedoring industry and its future operations. Movant has a vital interest in the questions involved herein, as presented in the petition, and as presented in the accompanying brief. Movant desires to have placed before the Court for its consideration its contention that the decision of the lower court in this case abrogates the United States Longshoremen's and Harbor Workers' Compensation Act, Title 33 U. S. C. A., Sec. 901 *et seq.*, and permits, condones and allows a circumvention of the intent and purposes of the Act by a branch of the stevedoring industry for whose benefit and protection the said Act was brought into being. The shipowners, as part of the shipping industry, should not be permitted to become a party to this circumvention of the Act and if they are desirous of protecting their interests they should be required to do so in a legal manner and not in a manner which causes a serious breach and violation of the intent and purposes of the United States Longshoremen's and Harbor Workers' Compensation Act. This point of view has not been clearly presented to this Court by the petition for a writ of certiorari herein.

The consideration of the question raised in the petition herein and the brief accompanying this petition is of great importance to the shipping industry as a whole and should receive the favorable consideration of this Court.

Respectfully submitted,

PAUL SPEER,
Counsel for National Association of Stevedores.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1954

No. 157

RYAN STEVEDORING CO., INC.,
Petitioner,

against

PAN-ATLANTIC STEAMSHIP CORPORATION,
Respondent.

CONSENT TO FILE BRIEF AS *AMICUS CURIAE* PURSUANT TO RULE 42 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

The undersigned counsel for petitioner hereby consents to the filing of the brief herein by Paul Speer as counsel for The National Association of Stevedores.

Dated: New York, N. Y.,
August , 1954.

SIDNEY A. SCHWARTZ,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1954

No. 157

RYAN STEVEDORING CO., INC.,
Petitioner,
against
PAN-ATLANTIC STEAMSHIP CORPORATION,
Respondent.

BRIEF OF THE NATIONAL ASSOCIATION OF STEVEDORES AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The petition for writ of certiorari herein presents to this Court two questions that are singularly important to the shipping industry, particularly to the stevedore employers engaged in furnishing stevedoring services in ports of the East, West and Gulf Coasts of the United States. These two questions as presented by the petition are:

(1) Is a contracting-stevedore, who complies with the provisions of the U. S. Longshoremen's and Harbor Workers' Compensation Act, Title 33, United States Code, § 901, *et seq.*, insulated under the very wording of the Act (§ 905) from any claim or action in which full indemnity (there being no express contract of indemnity) is sought against him by a shipowner who has been held liable to an employee of the contracting stevedore.

(2) If the aforesaid Act, as worded, does not furnish complete immunity to a contracting stevedore against a claim of indemnity, implied in law, of

a shipowner who has been liable to an injured employee of the contracting stevedore, can there be indemnity implied in the maritime law (there being no express contract of indemnity) between joint tort-feasors in a non-collision case, i.e., a personal injury action.

The National Association of Stevedores, which is composed of 150 stevedoring firms from all of the major ports of the United States, on behalf of itself and its members, desires to file this brief in support of the petition and have this Court review and clarify what is now considered to be an unnecessarily confused and complex situation that should not have been allowed to arise because of the provisions of the U. S. Longshoremen's and Harbor Workers' Compensation Act, Title 33, U. S. C. A. Sec. 901 *et seq.*

Some contracts made between shipowners and stevedoring firms contain provisions for indemnity. Other contracts for stevedoring services do not contain any provisions for indemnification as between the shipowner and the stevedoring firm.

When a shipowner desires to have the remedy of indemnification it can legally arrange for such remedy in the contract and the stevedoring firm can then arrange its contracting price accordingly, and also take means to protect itself against the assumed liability.

When a shipowner does not arrange to specifically provide for indemnification it then can avoid liability for injuries to stevedores by taking proper precautions against negligence or unseaworthiness or by taking proper steps to spread such losses amongst the shipping industry (*Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85).

Due to the many claims being made, in these times, by shipowners for non-contractual indemnification, the stevedoring industry now finds itself in a position of being open, in a great many instances, to pay damages, in actions at law or in admiralty, for injuries sustained by its employees

in spite of the fact that the U. S. Longshoremen's and Harbor Workers' Act, Title 33, U. S. C. A. 901 *et seq.*, has done away with such liability and specifically provides and limits the stevedore employer's liability to its employees, and anyone else, to compensation only. It is important to the stevedoring industry that it be definitely determined if the U. S. Longshoremen's and Harbor Workers' Compensation Act sets forth the exclusive liability of the employer to its employees and anyone else, or if the purposes of the Act are to be circumvented by the means of having shipowners placed in a position of being a collecting agent for the injured stevedore employees by collecting damages from their employers for injuries, which relief is specifically barred by the U. S. Longshoremen's and Harbor Workers' Compensation Act.

It is for the foregoing summarized reasons that it is respectfully requested that favorable consideration be given by this Court to the petition for writ of certiorari herein.

ARGUMENT.

A stevedore employer's compliance with the U. S. Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 901 *et seq.*, is a complete bar to any claim for indemnity, either partial or in full, made by a shipowner based on damages for injuries paid to an employee of the stevedore employer.

When a stevedore employer complies with the provisions of the statute dealing with compensation, 33 U. S. C. A 904, he secures the benefits of Sec. 905 of 33 U. S. C. A., which provides in part, as follows:

> "The liability of an employer prescribed in section 904 of this chapter *shall be exclusive and in place of all other liability of such employer* to the employee, his legal representative, husband or wife,

parents, dependents, next of kin, and *anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury.* * * *." (Italics supplied.)

The U. S. Longshoremen's and Harbor Workers' Act at no time attempts to differentiate between the nature of the circumstances causing or resulting in illness or injury. This act covers personal injuries that have been sustained without negligence; with the negligence of the shipowner, the stevedore employer, the employee himself, or any combination thereof. The provisions with respect to the exclusiveness of the limited liability are in the same broad and general terms.

The Act eliminated entirely negligence as a basis for an employee to recover compensation for his injuries, and was a new and complete substitute for the old system and basis. When the employer has complied with the requirements of the Act, the employee is confined solely to the rights and remedies provided by the Act. The purposes and intent of the Act should not be thwarted by the indirect means of the employee using a third party to accomplish results and collect damages which were barred in their entirety when the U. S. Longshoremen's and Harbor Workers' Act was enacted.

The shipowner, with full knowledge of the provisions of the Act and the exclusiveness of liability of the stevedore employer, as provided therein, can avoid any possible resulting liability on its part by taking the necessary precautions against negligence or unseaworthiness, and by using other means to spread its financial responsibility amongst the shipping industry when it fails to exercise the necessary precautions against negligence or unseaworthiness. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85.

The shipowner when it presents a claim for indemnity has to base this claim on the old system of liability between employer and employee, which has been done away with by

the Act, and, in addition, is acting as an intermediary of the stevedore employee to evade the effect, purposes and intent of the U. S. Longshoremen's and Harbor Workers' Act.

Implicit in a claim for non-contractual indemnity is a primary or basic liability in one person, though a second is also liable with that person to the third (*Restatement of Restitution, Sec. 86*). In order for a claim for non-contractual indemnity to succeed there must be that primary or basic liability in the stevedore employer. With the U. S. Longshoremen's and Harbor Workers' Act in existence there cannot be a primary or basic liability of a stevedore employer to its employee, because such liability was done away with by the U. S. Longshoremen's and Harbor Workers' Act.

In *Spaulding* v. *Parry Nav. Co., Inc., et al.*, 2 Cir., 187 F. 2d 257, action was brought by a shipowner to recover either contribution or indemnity from a ship repairer for damages which the shipowner had to pay to one of its seaman employees. In denying indemnity the Court said:

> "Parry claims indemnity from Todd on the theory that, although they were both liable to Spaulding as joint tort-feasors, Todd was the 'primary wrongdoer' and guilty of 'active negligence' in supplying an improperly secured ladder, while Parry's failure to correct the condition was only 'passive negligence.' A similar contention was very recently considered by us in Slattery v. Marra Bros., Inc., 2 Cir., 1951, 186 F. 2d 134. We there said that even on the assumption that the law of New Jersey may recognize that, when two persons are both liable for a tort, the difference in the gravity of their faults may be sufficient to justify putting the whole loss on one, *such a result is not rationally possible if only one of the two is liable to the injured person*" (p. 259). (Italics supplied.)

In *Slattery* v. *Marra Bros.*, 2 Cir., 186 F. 2d 134, a claim for indemnity was made by the lessee of a pier

against a stevedore employer. The lessee of the pier was held liable for injuries sustained by the employee of the stevedore employer. The stevedore employer had complied with the New Jersey Workmen's Compensation Act, which by its terms provided that the employer's liability was for compensation only and excluded all other liability. The Court in denying indemnity, held as follows:

> "We are therefore to assume that Slattery's contract of employment with the Spencer Company was a 'surrender * * * of * * * any other method, form or amount of compensation' for any injuries which he might receive 'in the course of his employment;' and the Spencer Company was under no liability to him of any kind. Therefore, the right of Marra Bros., Inc. to indemnity from the Spencer Company cannot rest upon any liability of that company to Slattery." (p. 138).
>
> * * * * *
>
> "We cannot, however, agree that that result (indemnity) is rationally possible except upon the assumption that both parties are liable to the same person for the joint wrong" (p. 139). (Parenthetical matter supplied.)

In *LoBue v. United States*, 2 Cir., 188 F. 2d 800, the Court in denying a claim by a shipowner that it was entitled to indemnity from a stevedore employer for an alleged breach of the stevedore's duty to the shipowner, said:

> "The United States cannot recover contribution from Jarka as a joint tort-feasor, for that presupposes a common liability to the injured party. Jarka's statutory liability to the libellant for compensation under the Longshoremen's Act is 'exclusive,' 33 U. S. C. A. § 905, and to permit contribution would be to permit the libellant to evade the statutory command by making of the negligent third party a 'conduit' for the recovery of damages from his employer in excess of the statutory compensa-

> tion. Porello v. U. S., 2 Cir., 153 F. 2d 605, 607; American Mutual Liability Insurance Co. v. Matthews, 2 Cir., 182 F. 2d 322, 323-324" (p. 802).
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> • • • • •
>
> "And we do not think that there can be any recovery over of indemnity under the maritime law for Jarka's breach of its duty to the United States to do its work in a careful, efficient manner. • • • And to permit a partial recovery over on an indemnity theory here would be to sanction an evasion of the rule and the rationale of the Matthews case, supra, by a mere change in nomenclature from 'contribution' to 'indemnity'" (p. 803).

In *Slattery* v. *Marra Bros.*, 2 Cir., 186 F. 2d 134, the Court in dealing with active and passive negligence as a basis for a non-contractual indemnity claim, held as follows:

> "So far as we can see therefore *there is nobody of sure authority for saying that differences in the degrees of fault will without more strip one of them, and if he is an employer, of the protection of a compensation act;* and we are at a loss to see any tenable principle which can support such a result." (Italics supplied.)

In *American Mut. Liability Ins. Co.* v. *Matthews*, 2 Cir., 182 F. 2d 322, the Court in dealing with a non-contractual claim of contribution, said:

> "'To impose a non-contractual duty of contribution on the employer is pro tanto to deprive him of the immunity which the statute grants him in exchange for his absolute, though limited, liability to secure compensation to his employees" (p. 324).

In dealing with the effect of Sec. 905 of 33 U. S. C. A. as a *release* from a claim of recovery, L. HAND, Ch. J., in a concurring opinion in the cited case, said:

> "• • • and the reason why I think it should be so construed is that it has imposed upon employers an

absolute, though limited, liability, in exchange for a release from the preceding unlimited liability, conditional upon negligence. *The release should, I submit, have the same scope as the imposed liability, which extends as well to injuries caused by a joint wrong, as to those caused by the wrong of the employer alone*" (p. 325). (Italics supplied.)

Whether the claim is for partial or full indemnity it is barred by the U. S. Longshoremen's and Harbor Workers' Act. To allow a claim for full indemnity and to deny a claim for partial indemnity because of the U. S. Longshoremen's and Harbor Workers' Act is not only inconsistent but an evasion of the intent and purposes of the Act and contrary to the rationale of the foregoing cases holding that the U. S. Longshoremen's and Harbor Workers' Act provides for the exclusive liability of the employer, eliminates the old remedies and liabilities and bars recovery other than compensation by any means by a stevedore employee from his employer based on the negligence of the employer.

The shipowners are apparently taking the position that although the U. S. Longshoremen's and Harbor Workers' Act bars any recovery by a stevedore employee from a stevedore employer, under the old system, the Act cannot prevent them from setting themselves up as a conduit by means of which a stevedore employee can circumvent and evade the purposes and intent of the U. S. Longshoremen's and Harbor Workers' Act. The shipowners have not been deprived of any rights which they may seek to enforce. With full knowledge of the terms and conditions and intent and purposes and the effects of the U. S. Longshoremen's and Harbor Workers' Act, if they wish to retain the right of indemnity either in full or in part, they may do so by means of contract. If they wish to follow this procedure to retain the right of indemnity, then the stevedore employer can adjust the terms of the contract and take other means to protect themselves from the contractual liability

assumed by them. If the shipowner does not wish to enter into such a contract, then it is free to take other steps to avoid or minimize its financial responsibility to stevedore employees, either by taking the necessary precautions imposed by law or making arrangements to spread such financial responsibility amongst the shipping industry.

As has been pointed out, the U. S. Longshoremen's and Harbor Workers' Act abrogated one system and set up a new one in its place. The law prescribes certain definite rights, remedies and liabilities and provides that the liability of an employer so prescribed shall be exclusive and limited. The employee has a certain and speedy remedy without the necessity, difficulty or expense of establishing negligence or proving the amount of the damages. The employer is left without defense respecting the question of negligence or fault, but at the same time is assured that the recovery is exclusive and limited and that it goes directly to the relief of the injured employee. The employer is obligated to provide insurance or to furnish satisfactory proof of its financial ability to pay such compensation and to give security (Sec. 932). Failure to do so renders him liable in an action at law or in admiralty for damages, in which action certain defenses are not available to the employer (Sec. 905). Failure to secure compensation as required shall constitute a misdemeanor (Sec. 938).

What has been done below in this case is a violation of the U. S. Longshoremen's and Harbor Workers' Act for it makes the employer liable indirectly in an amount which could not be recovered directly and by reason thereof a penalty or obligation has been imposed upon the employer which was not provided for in the Act or contemplated therein and which the Act was designed to eliminate entirely. The Court below by its holding has revived in part the old system, which the Act abrogated.

The employee involved in the accident herein had no cause of action against his employer and his sole remedy

was under the U. S. Longshoremen's and Harbor Workers' Act. This cannot be questioned. However, because the third party paid the employee, the latter is in fact permitted to recover damages from the employer. In other words, the employee receives a large sum of money through a negligence action from the employer merely because the money passes through the hands of a third party, and yet it must be conceded by all that the employer is not liable to the employee for such damages.

The action of the Court below in granting indemnity circumvents and destroys the purposes and intent of the U. S. Longshoremen's and Harbor Workers' Act.

Conclusion.

For the foregoing reasons it is respectfully submitted that the petition of Ryan Stevedoring Co., Inc., for writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Dated: New York, N. Y.

Respectfully submitted,

PAUL SPEER,
Counsel for National Association of Stevedores.

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HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October Term, 1954

No. 157

RYAN STEVEDORING CO., INC.,

Petitioner,

vs.

PAN ATLANTIC STEAMSHIP CORPORATION,

Respondent.

MOTION OF ASSOCIATION OF AMERICAN SHIP OWNERS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*.

IN THE

Supreme Court of the United States

OCTOBER TERM—1954.

No. 157.

RYAN STEVEDORING CO., INC.,

Petitioner,

v.

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

MOTION OF ASSOCIATION OF AMERICAN SHIP OWNERS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE.*

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Association of American Ship Owners respectfully applies to the Court for leave to file a brief as *amicus curiae* in this case. Respondent has consented to the filing of such brief, but petitioner has refused.

Nature of the Association's Interest.

The Association of American Ship Owners is an unincorporated association of shipping companies operating under the United States flag in the coastwise, intercoastal, and foreign trades.

The primary question before the Court in this case is as to the right of a shipowner to indemnity from a stevedoring company for those damages which the shipping company has been required to pay the stevedoring company's employee injured by reason of the stevedoring company's negligence in the performance of work pursuant to contract with the shipowner and in violation of the implied terms of that contract. Petitioner, the stevedoring company, asserts that the payment of the indemnity to which the shipowner would otherwise be entitled under such circumstances would violate Section 5 of the Longshoremen's and Harbor Workers' Act, and seeks reversal on that ground.

The interest of shipowners in supporting the decision below is apparent.

Reasons for the Submission of a Brief.

The courts have traditionally given more than usual weight to public policy in the decision of maritime cases. In its recent decision in *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282, this Court, in deciding against the shipowner a question of personal injury law, noted, at page 286, that the "carriers" had not presented their "wishes." In a case such as the present, which will substantially affect shipping companies generally, it seems to us important that the position of the industry be made clear.

Although we have not seen the respondent's brief, it is our understanding that it gives primary emphasis to the facts of this particular case. The purpose of the applicant's brief as *amicus curiae* would be to state succinctly—the brief, already drafted, is five pages long—principles and arguments applicable to the industry generally which, in our opinion, fall within the area of the considerations upon which the Court may base its decision.

Accordingly, it is respectfully requested that this application for leave to file a brief as *amicus curiae* be granted.

Respectfully submitted,

ASSOCIATION OF AMERICAN SHIP OWNERS.

By C. DICKERMAN WILLIAMS,
Counsel,
76 Beaver Street,
New York 5, N. Y.

MACLAY, MORGAN & WILLIAMS,
Of Counsel.

Office - Supreme Court, U. S.
FILED
SEP 2 2 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 4

RYAN STEVEDORING CO., INC.,
Petitioner,

v.

PAN-ATLANTIC STEAMSHIP CORPORATION,
Respondent.

MOTION OF AMERICAN MERCHANT MARINE INSTITUTE, INC. FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* ON REARGUMENT

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Counsel for Amicus Curiae, American Merchant Marine Institute, Inc.,
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New York 5, New York.

Of Counsel:
ALBERT E. RICE,
T. E. BYRNE, JR.,
J. WARD O'NEILL,
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LOUIS J. GUSMANO.

IN THE

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OCTOBER TERM, 1955

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RYAN STEVEDORING CO., INC.,
Petitioner,

v.

PAN-ATLANTIC STEAMSHIP CORPORATION,
Respondent.

MOTION OF AMERICAN MERCHANT MARINE INSTITUTE, INC. FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* ON REARGUMENT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The American Merchant Marine Institute, Inc. respectfully applies to this Court for leave to file a brief as an *amicus curiae* on the reargument of the above entitled action. Respondent has consented to the applicant's filing of a brief *amicus*. Petitioner has refused consent.

The fundamental question presented by the present petition concerns the right of a steamship company to recover from a contracting stevedore, by an action for indemnity, those damages which the steamship company may be compelled to pay to a longshoreman injured because of a condition negligently created by his own stevedore-employer.

As stated by petitioner in its motion for reargument, this question is of great importance in many cases.

Interest of American Merchant Marine Institute, Inc.

The American Merchant Marine Institute, Inc. is a non-profit New York membership corporation. Its members include 65 steamship companies which operate dry cargo and passenger vessels, colliers and tankers having a gross tonnage of nearly 6,750,000 tons. This represents about 60% of the privately owned American-flag merchant marine now operating in our foreign and domestic trades.

The problem which is presented on reargument is of extreme importance to your applicant and its member companies because the decision herein will have a direct and important bearing upon operating costs of American steamship companies.

Reasons for the Submission of Brief

At the time of the original argument herein your applicant moved to be permitted to submit a brief *amicus curiae*, which was denied. Petitioner opposed the filing of such a brief, partly on the ground that the facts in the case were not peculiar and would have no effect on any one other than the underwriters or the parties concerned. However, in its petition for re-hearing the petitioner stressed the tremendous interest of the entire shipping industry in the questions presented in the case.

Since the denial of applicant's motion to file a brief *amicus curiae* the vacancy existing in the Court has been filled and it is reasonable to assume that the entire Court may, in joining in the final determination of the case, wish to have additional views expressed by the shipping industry.

We have been advised that petitioner has filed no additional brief in this case and that its time to do so has expired. We are also advised that respondent does not intend to file additional briefs herein. Therefore applicant respectfully submits that the Court should, in this vital case, have before it a brief covering points and arguments not previously submitted.

Since the argument herein several decisions of the Court of Appeals for the Second Circuit have indicated that regardless of lack of notice, of fault, or opportunity to correct conditions a shipowner will be held absolutely liable to a longshoreman injured by a condition caused not by the shipowner or by anybody subject to his control, but rather by and through the fault of the contracting stevedore, the longshoreman's employer.[1] This same court has, however, been meticulous to avoid inequity by preserving the shipowners' rights to indemnity in such cases.[2]

Unless a shipowner is entitled to indemnity, there will be no direct and immediate economic pressure on the contracting stevedore to work toward the protection and safety of longshoremen.[3] Such a result was not contemplated in the legislative development of the Longshoremen's and Harbor Workers' Compensation Act.

In the light of this expanding liability now being established by the lower courts, we submit that our brief, emphasizing the need for a right of indemnity based upon the fundamental principle, regardless of contractual relationship, that one who has done no fault may recover from the wrongdoer, will present to the Court considerations which have not been developed by the parties.

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[1] *Tarkinut* v. *United States Lines*, 222 F. 2d 358.
Amador v. *A/S J. Ludwig Mowinckels Rederi*, No. 313, October Term 1954; Decided July 1, 1955, not yet reported.
Poignant v. *United States of America*, No. 285, October Term 1954; Decided July 22, 1955.

[2] *Berti* v. *Compagnie de Navigation Cyprien Fabre*, 213 F. 2d 397.

[3] *Bisso* v. *Inland Waterways Corporation*, 348 U. S. 811.

For the foregoing reasons, it is respectfully requested that this application for leave to file a brief as *amicus curiae* be granted.

Respectfully submitted,

AMERICAN MERCHANT MARINE INSTITUTE, INC.

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HAROLD B. WILLEY, Clerk

Supreme Court of the United States

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MOTION OF ASSOCIATION OF AMERICAN SHIP OWNERS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*.

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MOTION OF ASSOCIATION OF AMERICAN SHIP OWNERS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

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Nature of the Association's Interest.

The Association of American Ship Owners is an unincorporated association of shipping companies operating under the United States flag in the coastwise, intercoastal, and foreign trades.

The primary question before the Court in this case is as to the right of a shipowner to indemnity from a stevedoring company for those damages which the shipping company has been required to pay the stevedoring company's employee injured by reason of the stevedoring company's negligence in the performance of work pursuant to contract with the shipowner and in violation of the implied terms of that contract. Petitioner, the stevedoring company, asserts that the payment of the indemnity to which the shipowner would otherwise be entitled under such circumstances would violate Section 5 of the Longshoremen's and Harbor Workers' Act, and seeks reversal on that ground.

The interest of shipowners in supporting the decision below is apparent.

Reasons for the Renewal of the Association's Motion.

A similar motion filed by applicant on February 21, 1955, shortly before the original argument of the case, was denied by the Court.

Petitioner had opposed the motion on the ground of failure to comply with Rule 42(3) requiring that an applicant for leave to file a brief *amicus curiae* show facts or questions of law that have not been or will not be adequately presented by the parties to the matter.

As Rule 42 required that the motion be filed not later than February 21, and as respondent's brief was not then available, applicant found strict compliance with Rule 42(3) impossible. However, subsequent examination of the briefs filed by the parties on the original argument—and applicant understands that the parties will use on rearguments the same briefs they submitted on the original argument—has revealed facts and questions of law not, in our opinion, adequately presented.

Applicant's brief, as prepared to be filed if the original motion had been granted, has been revised and limited to the facts and questions [illegible] revealed. It is five pages in length.

The grounds urged by petitioner for denial of applicant's former motion are therefore not relevant to this motion.

Reasons for the Submission of a Brief.

1. The courts have traditionally given more than usual weight to public policy in the decision of maritime cases. A trade association is especially conscious of, and especially qualified to present, considerations of public policy. And the failure of the carriers to present their views in the recent case of *Halcyon Lines v. Haenn Ship Corp.*, 342 U. S. 282, was mentioned by this Court in its opinion, apparently as among the reasons for its adverse decision to the shipowner-respondent in that case.

This Court has only a few months ago emphatically declared that its certiorari jurisdiction is exercised in matters of importance to the public as distinguished from the parties. *Rice v. Sioux City Cemetery*, 23 U. S. Law Week, 4195. It would seem a necessary corollary that responsible representatives of those elements of the public with a stake in cases before the Court be permitted at least briefly to supplement the arguments of the parties—their fortuitous champions.

That this case is of public importance would seem no longer open to argument. This Court granted rehearing on a petition representing the case to be of "tremendous public importance" (p. 2), referring to "impact . . . on entire shipping industry" (p. 3), "tremendous importance to the Maritime Industry" (p. 3), "tremendous importance

to the one of the foremost industries of our country" (p. 4), "questions that were presented to this Court by petitioner" as "present in hundreds, if not indeed, thousands" of pending cases (pp. 4-5), and quoting a letter from Chief Judge Inch as to the numerous such cases in the Eastern District of New York (pp. 11-12).

Petitioner concluded with the assertion that the Court

> "is being asked not to concern itself with the particular litigants here involved but to settle the law between man (shipowner) and man (stevedore-employer)" (p. 5).

Why, then, should the arguments be restricted to the "particular litigants here involved," especially as vis-a-vis a trade association?

2. The parties have not, in applicant's opinion, adequately presented the considerations of public policy requiring affirmance of the decision below.

(a) In particular, they have not sufficiently emphasized and demonstrated that to adopt petitioner's contentions would be to construe the statute as *encouraging employer negligence*—an absurd result for a workmen's compensation law.

(b) The parties have not, in applicant's opinion, adequately presented the inferences to be drawn from the, in effect, concession by petitioner that an express contract of indemnity would be valid according to its terms. In short, petitioner recognizes, as it must, that any rule against contribution yields to express contract. But in so doing, petitioner gives away its case. If petitioner made a promise it is equally enforceable, whether spelled out in so many words or whether it follows by implication from undertakings expressly stated, as held by the Court below.

Accordingly, it is respectfully requested that this application for leave to file a brief as *amicus curiae* be granted.

Respectfully submitted,

ASSOCIATION OF AMERICAN SHIP OWNERS.

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